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Recent Developments in Aviation Law

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RECENT DEVELOPMENTS IN AVIATION LAW

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I. FORUM NON CONVENIENS

FORUM NON CONVENIENS is the doctrine by which an appropriate forum may divest itself of jurisdiction if it appears that the action would more appropriately be conducted in an-

other forum in which the action might originally have been brought.[1] Dismissal on the ground of *forum non conveniens* "will ordinarily be appropriate where trial in the plaintiff's chosen forum imposes a heavy burden on the defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice."[2]

A. SINOCHEM INTERNATIONAL CO. V. MALAYSIA INTERNATIONAL SHIPPING CORP.

In *Sinochem International Co. v. Malaysia International Shipping Corp.*,[3] the underlying controversy related to alleged misrepresentations by a Chinese importer to a Chinese admiralty court that resulted in the arrest of a Malaysian shipping company's vessel in China.[4] The Supreme Court reversed the Third Circuit decision, which had found that the district court should not have dismissed the case under the *forum non conveniens* doctrine unless and until it had determined definitively that it had both personal and subject matter jurisdiction.[5]

The Supreme Court indicated that discovery concerning personal jurisdiction would have burdened the Petitioner-Plaintiff with expense and delay, "[a]nd all to scant purpose."[6] In finding that the district court was not required to establish its own jurisdiction before dismissing the suit on the grounds of *forum non conveniens*, the Supreme Court explained that "where subject-matter or personal jurisdiction is difficult to determine, and *forum non conveniens* considerations weigh heavily in favor of dismissal, the court properly takes the less burdensome course."[7] The Supreme Court further stated:

> The Court said in *Gulf Oil* that "the doctrine of *forum non conveniens* can never apply if there is [an] absence of jurisdiction," . . . [however,] the Court said nothing that would negate a court's authority to presume, rather than dispositively decide, the propriety of the forum in which the plaintiff filed suit.

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[1] *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 504 (1947).

[2] Piper Aircraft Co. v. Reyno, 454 U.S. 235, 249 (1981) (citing *Gulf Oil*, 330 U.S. at 508–09).

[3] 127 S. Ct. 1184 (2007).

[4] *Id.* at 1188.

[5] *See id.* at 1193–94 (citing Malay. Int'l Shipping Corp. v. Sinochem Int'l Co., 436 F.3d 349 (3d Cir. 2006)).

[6] *Id.* at 1194.

[7] *Id.*

> [Additionally,] *Gulf Oil* did not present the question we here address: whether a federal court can dismiss under the *forum non conveniens* doctrine before definitively ascertaining its own jurisdiction. . . . [W]e find in *Gulf Oil* no hindrance to the decision we reach today.[8]

The Supreme Court concluded that this was a "textbook case for immediate *forum non conveniens* dismissal."[9]

B. In re Air Crash Near Athens, Greece on August 14, 2005

In *In re* Air Crash Near Athens, Greece on August 14, 2005,[10] the representatives of ninety-two crew members and passengers killed in the crash of Helios Airways Flight 522 from Cyprus to Prague brought seven actions against Boeing, the aircraft manufacturer, alleging wrongful death claims based on strict products liability, negligence, and breach of warranty.[11] After discovery had commenced, Boeing moved to dismiss the claims on grounds of *forum non conveniens* in favor of litigation in Cyprus or Greece.[12]

In deciding the motion, the U.S. District Court for the Northern District of Illinois first examined the availability of an adequate alternative forum and then considered the various private and public interest factors relating to the proper location of the litigation.[13] The defendant bears the burden of persuasion under the *forum non conveniens* doctrine.[14]

In applying this analysis, the district court found that both the courts of Greece and Cyprus were "available" in the sense that Boeing had agreed to consent to the jurisdiction of both countries, and that Plaintiffs did not dispute the availability of those courts.[15] In considering whether Greece and Cyprus were "adequate" fora, the district court found that Boeing had offered evidence that both offer "potential avenues for redress."[16] Plaintiffs did not dispute that they could assert claims based upon negligence in both fora.[17] The district court reasoned that

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[8] *Id.* at 1193.
[9] *Id.* at 1194.
[10] 479 F. Supp. 2d 792 (N.D. Ill. 2007).
[11] *Id.* at 796.
[12] *Id.*
[13] *Id.* at 797–805.
[14] *Id.* at 797 (citing *In re* Ford Motor Co., 344 F.3d 648, 652 (7th Cir. 2003)).
[15] *Id.*
[16] *Id.*
[17] *Id.*

"[w]hile the procedures in the courts in Cyprus and Greece differ from those of the United States courts, adequate procedural safeguards exist in both Cyprus and Greece."[18] Further, although the plaintiffs argued that certain limitations in the Cyprus and Greek legal systems reflected a lesser public interest in those fora, Plaintiffs did not contend that these limitations rendered those fora inadequate.[19]

Regarding the private and public interest factors, the district court noted that only two of the ninety Plaintiffs in the case were U.S. residents, five were Greek and the remaining were Cypriot, and stated that "a foreign plaintiff's choice to bring suit in the United States is entitled to less deference because trial of a foreign plaintiff's claims in the United States is likely to be less convenient."[20] With respect to the Greek Plaintiffs, who were entitled to status equal to Americans under the treaty between the United States and Greece,[21] it was "still likely to be less convenient for the Greek plaintiffs to pursue their claims in the United States."[22] The district court found that the relevant private interest factors in this case included

> the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.[23]

In its analysis, the district court found that most of the evidence relating to the investigation of the crash, including the wreckage of the accident airplane and information relating to the post-mortem examinations of the decedents, was located in Greece.[24] Most of the evidence relating to Helios, a Cyprus-based airline, would be located in Cyprus.[25] While most, if not all, of the evidence and witnesses with knowledge relating to the design and manufacture of the Boeing airplane and its compo-

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[18] *Id.*

[19] *Id.* at 797–98.

[20] *Id.* at 798 (citing Piper Aircraft Co. v. Reyno, 454 U.S. 235, 256 (1981)).

[21] *See* Treaty of Friendship, Commerce and Navigation, U.S.-Greece, art. 1, Aug. 3, 1951, 5 U.S.T. 1829.

[22] *In re Air Crash Near Athens, Greece on Aug. 14, 2005*, 479 F. Supp. 2d at 798 (citing *In re* Ford Motor Co., 344 F.3d 648, 653 (7th Cir. 2003)).

[23] *Id.* (citing *In re* Bridgestone/Firestone, Inc., 420 F.3d. 702, 704 (7th Cir. 2005)).

[24] *Id.* at 800.

[25] *Id.*

nent parts were located in the United States, Boeing agreed to make relevant evidence or witnesses in its possession, custody, or control available in Cyprus or Greece.[26] Further, most of the damages evidence was located in Cyprus.[27]

In light of Boeing's agreement to produce its documents and witnesses in Cyprus and Greece, the district court found that the relative ease of access to proof favored those fora over the U.S. courts.[28] The district court concluded that the deference usually given to a plaintiff's choice of forum was outweighed by other relevant factors.[29] Namely, the district court found that, given the ease of access to sources of proof in Cyprus, the strong public interest of both Cyprus and Greece in having the actions decided in their respective countries, and pending related litigation between Helios and Boeing in Greece, either Cyprus or Greece would be a more convenient forum and therefore dismissed the action.[30]

C. ESHEVA V. SIBERIA AIRLINES

Esheva v. Siberia Airlines[31] concerned claims relating to the Siberian Airlines' ("Sibir") crash that occurred on July 9, 2006.[32] Of the 203 passengers and crew members onboard a Sibir flight from Moscow to Irkusk, Russia, 124 died when the aircraft overran the runway in Irkusk.[33] None of the passengers were U.S. residents or were scheduled for continuing travel to the United States.[34] The aircraft was designed and manufactured in France by Airbus, S.A.S., owned by Wilmington Trust Company, and leased to Defendant Airbus Leasing II, Inc. ("Airbus"), a Delaware corporation with its principal place of business in Virginia.[35] Airbus, in turn, subleased the aircraft to Sibir.[36] The aircraft was registered in France and it was maintained in Russia and Germany.[37]

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[26] *Id.* at 799–800.
[27] *Id.* at 800.
[28] *Id.*
[29] *Id.* at 805.
[30] *Id.*
[31] 499 F. Supp. 2d 493 (S.D.N.Y. 2007).
[32] *Id.* at 496.
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*

Complaints were filed on behalf of 158 passengers and crew members alleging negligence and vicarious liability against Sibir and vicarious liability against Airbus.[38] Later, a separate complaint was filed on behalf of an additional twenty-six passengers and crew members, alleging similar causes of action against the same defendants.[39]

Airbus entered into an agreement in which certain plaintiffs agreed to waive punitive damages claims against Airbus, not to sue any other Airbus entity, not to sue Airbus outside the district except in France, and to dismiss all claims against Airbus if their claims against Defendant Sibir were dismissed.[40] Airbus agreed to sue Sibir, to refrain from moving to dismiss the claims filed in New York on *forum non conveniens* grounds, "and to oppose efforts to sever or dismiss the New York action."[41] Plaintiffs and Airbus also "agreed that French law govern[ed] the claims amongst them."[42] In accordance with this agreement, Airbus filed a cross-claim against Sibir in both of the actions pending before the district court.[43]

Defendant Sibir then "moved to dismiss both actions on the ground of *forum non conveniens*."[44] Sibir agreed "not to contest liability in Russia, to pay full compensatory damages to all plaintiffs as determined by a Russian court, and to waive any statute of limitations for actions filed in Russia within six months of dismissal [in the United States]."[45]

In evaluating the motions to dismiss both actions, the U.S. District Court for the Southern District of New York applied the Second Circuit's three-step analysis:

> At step one, a court determines the degree of deference properly accorded the plaintiff's choice of forum. At step two, it considers whether the alternative forum proposed by the defendants is ade-

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[38] *Id.*

[39] *Id.* The U.S. District Court for the Southern District of New York issued this decision for two related cases, Nos. 06 Civ. 11347 (DLC) and 06 Civ. 13409 (DLC). *Id.* at 493.

[40] *Id.* at 496.

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.* at 497. By the time the district court ruled on the motion, Airbus's cross-claim against Sibir had been resolved. *Id.* at 496. Thus, although "much" of Plaintiffs' opposition to the motion to dismiss relied upon the cross-claim by Airbus against Sibir and the "contractual relationship" between these Defendants, the district court found that these arguments had "no remaining relevance to the motion." *Id.* at 497 n.2.

[45] *Id.* at 497.

> quate to adjudicate the parties' dispute. Finally, at step three, a court balances the private and public interests implicated in the choice of forum.[46]

First, the district court found that the plaintiffs' choice of forum in this case was entitled to "substantially reduced deference."[47] Most of the surviving plaintiffs and representatives of decedents were Russian residents, and the witnesses and "[e]ssentially all of the relevant evidence" also were in Russia.[48] Further, the district court criticized the U.S. based plaintiffs' counsel, stating that it appeared that they had filed lawsuits on behalf of foreign plaintiffs "who were injured abroad to gain advantage in settlement discussions from the substantial damage awards that may be obtained from American juries and to inconvenience the principal defendant, a Russian corporation."[49] The district court also noted

> There [was] a compelling argument that Airbus was added to this litigation solely to provide some American nexus to the litigation, albeit not a New York nexus. To the extent that it is facing a claim of derivative liability, Airbus is absolutely immune for such liability in the United States. American law provides that a "lessor . . . is liable for personal injury, death or property loss or damage . . . only when a civil aircraft . . . is in the actual possession or control of the lessor. . . ."[50]

Next, the district court found that the alternative forum was adequate, rejecting Plaintiffs' arguments that Russia's courts operated "under a cloud of corruption."[51] The district court stated that "[s]everal judges in this district . . . have refused to hold that the Russian judicial system is too corrupt to constitute an adequate alternative forum."[52]

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[46] *Id.* (quoting Norex Petroleum Ltd. v. Access Indus., Inc., 416 F.3d 146, 153 (2d Cir. 2005)).

[47] *Id.* at 498.

[48] *Id.* at 498, 500.

[49] *Id.* at 498.

[50] *Id.* at 499 n.4 (citing 49 U.S.C. § 44112(b) (2000)).

[51] *Id.* at 499.

[52] *Id.* (citing Overseas Media v. Skvortsov, 441 F. Supp. 2d 610, 617–18 (S.D.N.Y. 2006) (collecting cases); Base Metal Trading, S.A. v. Russian Aluminum, 253 F. Supp. 2d 681, 708 n.23 (S.D.N.Y. 2003) (stating that, *inter alia*, an expert's "broad and conclusory allegations, founded on multiple levels of hearsay, are insufficient to condemn the entire Russian judiciary as an inadequate alternative forum")).

Finally, the district court found that the private and public interest factors weighed strongly in favor of transfer.[53] The court explained that, *inter alia*, Russia had a stronger "interest in responding to an accident that occurred in its territory," that resulted in injuries to its citizens, "and that involved a Russian airline."[54] Furthermore, Russia already had conducted an investigation and was still pursuing a criminal investigation relating to the accident.[55] Accordingly, the district court granted Sibir's motion to dismiss on the condition that Sibir would "concede liability if sued in Russian courts by any plaintiff in [the] actions within six months of entry of [its] Opinion and Order, [would] waive any statute of limitations in such actions, and [would] pay full compensatory damages as determined by a Russian court to all such plaintiffs."[56]

D. Travelers Property Casualty Co. of America v. DHL Danzas Air & Ocean

Travelers Property Casualty Co. of America v. DHL Danzas Air & Ocean[57] involved an action for damages in the U.S. District Court for the Southern District of New York arising from a shipment of pharmaceuticals from Gurabo, Puerto Rico to Uterson, Germany.[58] Defendant Air Express[59] removed the action originally filed in New York State Supreme Court to the district court pursuant to the Warsaw Convention and 28 U.S.C. § 1441(a).[60] Defendant moved to dismiss the complaint on the grounds of *forum non conveniens* to Germany or, alternatively, to transfer the action to the U.S. District Court for the District of Puerto Rico pursuant to 28 U.S.C. § 1404(a).[61]

Plaintiff Travelers Property Casualty Company of America ("Travelers"), which has a New York City office and is authorized to conduct business in New York, was subrogated to the interests of its insured, Janssen Ortho LLC ("Janssen"), a Connecticut company.[62] Air Express, an international shipping company, is

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[53] *Id.* at 500.

[54] *Id.*

[55] *Id.*

[56] *Id.* at 501.

[57] No. 05 Civ. 6303 (DC), 2006 WL 1443201 (S.D.N.Y. May 23, 2006).

[58] *Id.*

[59] Air Express was incorrectly named in the complaint as "DHL Danzas Air & Ocean a/k/a Danzas Corporation and DHL Holdings (USA), Inc." *Id.* at *1 n.1.

[60] *Id.* at *1.

[61] *Id.*

[62] *Id.*

an Ohio corporation with its principal place of business in Florida, but also operated an office at John F. Kennedy Airport in New York.[63] Janssen had employed Air Express to ship three skids of pharmaceuticals from Puerto Rico to Germany.[64] Travelers alleged that the goods arrived in damaged condition due to Air Express' "negligence during shipping."[65]

In analyzing Defendant's *forum non conveniens* motion, the district court found that Plaintiff's choice of forum was entitled to some deference.[66] The choice of New York as a forum would be convenient to Janssen, as it was based in Connecticut, while Travelers, Janssen, and Air Express were all companies organized under laws of the United States, "and Air Express [was] amenable to suit in New York."[67] Furthermore, "at least some documents and witnesses [were] located in New Jersey and Connecticut," within 100 miles of the forum, and there was no evidence that suggested that Travelers was forum-shopping on the basis that U.S. laws were more favorable to it than the laws of other countries.[68]

The district court explained that although Germany may have been an adequate alternative forum, Defendant Air Express had not shown that the public and private factors that favored outright dismissal of the case outweighed the deference due to Plaintiff's choice of forum.[69] Based on the foregoing, the district court denied Defendant's *forum non conveniens* motion.[70]

However, the district court granted the alternative request for transfer, explaining that "[u]nder 28 U.S.C. § 1404(a), a court may transfer any civil action to any other district where the case might have been brought if the transfer serves 'the convenience of parties and witnesses, [and is] in the interest of justice.'"[71] The district court found that Defendant had satisfied its burden[72] of demonstrating that the action should be transferred to

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[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.* at *2.

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.* at *3.

[71] *Id.* at *2 (citing 28 U.S.C. § 1404(a) (2000)).

[72] The party seeking a § 1404(a) transfer has the burden to present facts that are "clear and convincing" in support of transfer. *Id.* (citing 28 U.S.C. § 1404(a) and Millennium L.P. v. Dakota Imaging, Inc., No. 03 Civ. 1838 (RWS), 2003 WL 22940488, at *6 (S.D.N.Y. Dec. 15, 2003)).

Puerto Rico because all of the most important witnesses and documents were located there, or at least outside of New York.[73] Also, courts in Puerto Rico and New York were "equally able to apply the laws of the Warsaw Convention."[74] Accordingly, the action was transferred to the U.S. District Court for the District of Puerto Rico.[75]

E. BRITTON V. DALLAS AIRMOTIVE, INC.

In *Britton v. Dallas Airmotive, Inc.*,[76] the California Court of Appeal addressed a *forum non conveniens* based motion to dismiss filed by a party that already had made a general appearance.[77] In affirming a stay of litigation on *forum non conveniens* grounds,[78] the Court of Appeal confirmed that, absent unreasonable delay or other prejudice to the parties, a defendant may properly bring a *forum non conveniens* motion after making a general appearance in the action, and that a trial court has the authority to raise the *forum non conveniens* issue on its own motion.[79]

Britton involved the crash of a helicopter near Webb, Idaho, in August of 2003.[80] Plaintiff John Britton piloted the helicopter during a firefighting operation when the engine allegedly failed, resulting in a "hard landing" that injured Britton and damaged the helicopter.[81] Plaintiffs included Mr. Britton, his wife, and the helicopter owner, Silverhawk Aviation.[82] Plaintiffs commenced an action against Rolls Royce Engine Services Oakland, Inc. ("RRES"), and Dallas Airmotive, Inc. (both of which allegedly serviced the engine), as well as Rolls Royce Corporation, which manufactured the engine through a predecessor company.[83]

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[73] *Id.* at *3.

[74] *Id.*

[75] *Id.* at *4.

[76] 62 Cal. Rptr. 3d 487 (Ct. App. 2007).

[77] *Id.* at 488.

[78] When Dallas Airmotive renewed the motion to stay or dismiss the action on the ground of *forum non conveniens*, Rolls Royce and Rocky Mountain filed joinders. *Id.* at 489. Another judge of the superior court stayed the action pending initiation and conclusion of litigation in the Idaho court. *Id.*

[79] *Id.* at 490–92.

[80] *Id.* at 488.

[81] *Id.*

[82] *Id.*

[83] *Id.*

Defendant RRES moved to stay or dismiss based on the doctrine of *forum non conveniens*, and Dallas Airmotive and Rolls Royce filed a joinder to the motion.[84] The California Superior Court concluded that RRES had not met its burden of presenting sufficient evidence of relevant contacts in the proposed alternative forum, Idaho, and that RRES had "essentially eschewed all discussion of the public interest factors" and thus, the Court denied Defendants' *forum non conveniens* motion without prejudice.[85] However, after the action was remanded following removal to federal court by Defendant Dallas Airmotive, the trial court granted RRES's unopposed motion for summary judgment.[86] Defendant Dallas Airmotive thereafter renewed the *forum non conveniens* motion to dismiss or stay the claim, and Rolls Royce and additional Defendant, Rocky Mountain Holdings, filed joinders.[87] The renewed motion was filed almost a year after most of the defendants had answered.[88] The Superior Court granted Dallas Airmotive's motion to stay, "pending initiation and conclusion of litigation in the Idaho court."[89]

Plaintiffs appealed, contending "that the renewed *forum non conveniens* motion was untimely," that the defendants had "waived" the *forum non conveniens* defense by answering the complaint, and that the Superior Court had no discretion to consider the matter on its own motion.[90] The Court of Appeal accepted the Superior Court's weighing of the public and private *forum non conveniens* factors and its stay of the action in favor of an Idaho forum.[91]

The Court of Appeal stated that the Superior Court had concluded that "the defendant Dallas [Airmotive] had 'offered substantial and persuasive evidence that the private factors of access to witnesses not otherwise subject to having their appearance at trial in California compelled, and to other evidence, favor an Idaho forum."[92] The Court of Appeal continued that "as the accident did not occur here, no party resides here, and there is no other significant connection with the California forum . . .

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[84] *Id.*

[85] *Id.*

[86] *Id.* at 488–89.

[87] *Id.* at 489.

[88] *Id.* at 490.

[89] *Id.* at 489.

[90] *Id.* at 489–90.

[91] *Id.* at 492 (citing Stangvik v. Shiley Inc., 819 P.2d 14, 16–18 (Cal. 1991)).

[92] Citing unpublished text within *Britton*, 62 Cal. Rptr. 3d at 492 (quoting the trial court's unpublished decision) (citation omitted).

[t]he balance of the public and private interest thus heavily favors an Idaho forum over a California forum."[93]

The Court of Appeal rejected the argument that Defendants had waived their *forum non conveniens* defense because they had answered the complaint and participated in the action.[94] The Court of Appeal construed the relevant statutes on motions to stay or dismiss relating to *forum non conveniens* motions as acting in harmony.[95] Where the defendant has not yet appeared, the first statute applied, and the second applied after the defendant had appeared.[96] As the court explained, "to retain a case for the entire duration of the litigation because the lack of connection to California was unclear at the outset would impair the state's interest in avoiding burdening courts and potential jurors with litigation in which the local community has little concern."[97]

II. FEDERAL PREEMPTION

A. AIRLINE DEREGULATION ACT OF 1978

Congress enacted the Airline Deregulation Act ("ADA")[98] with the intention of reducing costs and improving the efficiency, quality, and innovation of the airline industry by relying on maximum market competition.[99] To prevent states from enacting legislation that would undermine this federal goal, the ADA prohibits states from enforcing or enacting any law or regulation "related to the price, route or service of an air carrier."[100] The Supreme Court has held that the ADA preempts any state law or cause of action that has a "forbidden significant

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[93] *Id.*

[94] *Id.* at 491. The court explained that where a defendant had not appeared, § 418.10 of the California Code of Civil Procedure "applies and specifies the procedure for bringing a *forum non conveniens* motion." *Id.* (citing CAL. CIV. PROC. CODE § 418.10 (West 2004 & Supp. 2008)). Section 410.30 of the California Code of Civil Procedure applies after a defendant has appeared. *Id.* (citing CAL. CIV. PROC. CODE § 410.30 (West 2004 & Supp. 2008)). The court found that this harmony between the two statutes was reasonable since "it may be necessary to conduct discovery to develop the factual underpinnings of a *forum non conveniens* motion." *Id.* (citing Morris v. AGFA Corp., 51 Cal. Rptr. 3d 301, 308–09 (Ct. App. 2006)).

[95] *Id.* at 491 (citing CAL. CIV. PROC. CODE §§ 410.30, 418.10).

[96] *Id.* (citing CAL. CIV. PROC. CODE §§ 410.30, 418.10).

[97] *Id.* at 492 (citing Stangvik v. Shiley, Inc., 819 P.2d 14, 17 (Cal. 1991)).

[98] 49 U.S.C. § 41713(b)(1) (2000).

[99] Morales v. Trans World Airlines, Inc., 504 U.S. 374, 378 (1992).

[100] 49 U.S.C. § 41713(b)(1).

effect" on airfares, routes, or services.[101] Exceptions include state actions that are "too tenuous" or "remote" to affect airline fares, routes, or services or actions that concern a breach of an airline's own contracts, terms, policies, or stipulations.[102]

1. Signer v. DHL Worldwide Express, Inc.

The decision of the U.S. District Court for the Southern District of Florida in *Signer v. DHL Worldwide Express, Inc.*,[103] involved the loss and subsequent sale of Plaintiff designer's "one-of-a-kind" clothing.[104] Plaintiff contracted with Defendant shipping company to transport a trunk of clothing worth over $100,000 from New York to Cincinnati, Ohio.[105] Defendant accepted the trunk, but failed to deliver it to the agreed-upon destination.[106] Less than four months later, a "one-of-a-kind" dress from the trunk was offered for sale on eBay by a liquidator of Defendant shipping company's lost items.[107] Plaintiff commenced an action in the Circuit Court of the Seventeenth Judicial Circuit in Broward County, Florida, for "conversion, civil theft, violation of the Florida Deceptive and Unfair Trade Practices Act, and fraud."[108]

Defendant filed a Notice of Removal to the U.S. District Court for the Southern District of Florida, arguing that Plaintiff's claims were preempted by the ADA or, alternatively, governed by federal common law and, therefore, the district court had federal question jurisdiction over the action pursuant to 28 U.S.C. § 1331.[109] Plaintiff moved to remand, arguing that because the complaint raised solely state-law claims, no federal question appeared on the face of the complaint, and therefore the district court did not have jurisdiction under the well-pleaded complaint rule.[110] Plaintiff further argued that none of the exceptions to the well-pleaded complaint rule applied, be-

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[101] Harrington v. Delta Air Lines, Inc., No. Civ.A. 04-12558-NMG, 2006 WL 1581752, at *3 (D. Mass. Feb. 21, 2006) (quoting *Morales*, 504 U.S. at 388).

[102] *See Morales*, 504 U.S. at 390 (quoting Shaw v. Delta Airlines, Inc., 463 U.S. 85, 100 n.21 (1983)); *see also* Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 228, 232–33 (1995); *Harrington*, 2006 WL 1581752, at *3.

[103] No. 06-61932-CIV, 2007 WL 1521497 (S.D. Fla. May 22, 2007).

[104] *Id.* at *1.

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *See id.*

[110] *Id.*

cause the state law claims did not present a substantial question of federal law, and the ADA did not "completely" preempt the claims.[111]

In considering Plaintiff's motion, the district court explained the "well-pleaded complaint rule," stating:

> A case does not arise under federal law unless a federal question is presented on the face of the plaintiff's complaint. This is known as the "well-pleaded complaint" rule, because "it directs our focus to the terms of the complaint *as the plaintiff chooses to frame it.* If the plaintiff elects to bring only state law causes of action in state court, no federal question will appear in the complaint that could satisfy the well-pleaded complaint rule, and the case may not be removed to federal court.
>
> Because a federal question must appear on the face of the plaintiff's complaint to satisfy the well-pleaded complaint rule, a defense which presents a federal question can not create removal jurisdiction."[112]

However, the district court noted two exceptions to the well-pleaded complaint rule: (1) when a substantial question of federal law is disputed and is an essential element of the "well-pleaded state claims;"[113] or (2) where the area of law is preempted "so completely" by federal law such that any claims in that area are "necessarily federal in character."[114]

Defendant conceded that Plaintiff's claims did not necessarily involve a substantial question of federal law, but rather attempted to argue "that federal common law and/or the ADA have 'completely preempted' all state law claims, so the only remaining viable claims are based on federal common law."[115] In considering Defendant's complete preemption argument, the district court contrasted complete preemption with "ordinary preemption," stating:

> "[O]rdinary preemption may be invoked in both state and federal court as an affirmative defense to the allegations in a plaintiff's complaint. Such a defense asserts that the state law claims have been *substantively displaced by* federal law. However, a case

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111 *Id.*

112 *Id.* at *2 (quoting Kemp v. Int'l Bus. Machs. Corp., 109 F.3d 708, 712 (11th Cir. 1997)).

113 *Id.* at *3 (quoting Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 13 (1983)).

114 *Id.* (quoting *Kemp*, 109 F.3d at 712).

115 *Id.* at *4.

> may not be removed to federal court on the basis of a federal defense, including that of federal preemption."[116]
>
> "Complete preemption, on the other hand, is a doctrine distinct from ordinary preemption. Rather than constituting a defense, [complete preemption] is a narrowly drawn jurisdictional rule for assessing federal removal jurisdiction when a complaint purports to raise only state law claims." Complete preemption "looks beyond the complaint to determine if the suit is, in reality, 'purely a creature of federal law,' even if state law would provide a cause of action in the absence of the federal law. It transforms the state claim into one arising under federal law, thus creating the federal question jurisdiction requisite to removal to federal courts."[117]

The United States Court of Appeals for the Eleventh Circuit had explained that the complete preemption analysis turns on whether the federal law in question shows Congress' intent to provide both a valid defense, as well as the right to remove the case to federal court.[118] It also had stated that only federal laws with "extraordinary preemptive force" will completely preempt state law.[119] The district court observed that "[t]he majority of courts to consider the question of whether there is complete preemption under the ADA have held that the ADA does not completely preempt state law."[120] The district court agreed and found that because "Congress did not intend for the ADA to completely preempt state law," removal was not proper on complete preemption grounds.[121]

The district court similarly rejected Defendant's argument that it had federal question jurisdiction because Plaintiff's claims were preempted by "federal common law."[122] The district court noted that several of the courts holding that the ADA did not completely preempt state law claims also found that federal common law did not preempt state law claims.[123] Further, as previously noted, the Eleventh Circuit had stated that complete preemption depends on congressional intent, but the district court indicated that federal common law is not developed

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[116] *Id.* at *3 (quoting Geddes v. Am. Airlines, Inc., 321 F.3d 1349, 1352–53 (11th Cir. 2003)).

[117] *Id.* (quoting *Geddes*, 321 F.3d at 1353).

[118] *Id.* (citing *Geddes*, 321 F.3d at 1352–53).

[119] *Id.* (quoting *Geddes*, 321 F.3d at 1353).

[120] *Id.* at *4 (collecting cases).

[121] *Id.*

[122] *Id.*

[123] *Id.* (collecting cases).

or driven by congressional intent.[124] To recognize federal jurisdiction solely on this basis "would contradict the Eleventh Circuit's instructions on the differences between complete and ordinary preemption."[125]

The district court also rejected the argument that federal question jurisdiction was present when the claim "arises under federal common law."[126] It noted, *inter alia*, that "[b]ringing a claim framed in terms of the federal common law is a very different situation from bringing a claim in terms of state law and having a defendant assert that the claim is preempted by federal common law."[127] The district court further noted that the latter "is the very situation that the Eleventh Circuit ha[d] indicated does not have the [requisite] 'extraordinary force to create federal removal jurisdiction.'"[128]

Defendant's final argument was that "the 'only viable cause of action against [it] is one for breach of contract under federal common law.'"[129] However, the district court found that not only was this an ordinary preemption argument, but also that "the Supreme Court has held that 'the ADA permits state-law-based court adjudication of routine breach-of-contract claims.'"[130] Because the district court found that Plaintiff's claims were not preempted, it thus determined that it did not have federal question jurisdiction over the action and, accordingly, granted Plaintiff's motion to remand.[131]

2. *Buck v. American Airlines, Inc.*

In *Buck v. American Airlines, Inc.*,[132] the U.S. Court of Appeals for the First Circuit addressed Plaintiff airline ticket purchasers'

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[124] *Id.* at *5 (citing Merkel v. Fed. Express Corp., 886 F. Supp. 561, 566 (N.D. Miss. 1995)).

[125] *Id.*

[126] *Id.* at *5–*6 (quoting Sam L. Majors Jewelers v. ABX, Inc., 117 F.3d 922, 929 (5th Cir. 1997)).

[127] *Id.* at *6.

[128] *Id.* (quoting Geddes v. Am. Airlines, Inc., 321 F.3d 1349, 1353 (11th Cir. 2003)).

[129] *Id.* at *7 (quoting Defendant's Answer to Plaintiff's Complaint at 1, 9–11, Signer v. DHL Worldwide Express, Inc., No. 06-61932-CIV, 2007 WL 1521497 (S.D. Fla. Jan. 5, 2007), 2007 WL 620938).

[130] *Id.* (quoting Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 232–36 (1995)).

[131] *Id.* Plaintiff also had moved for attorneys' fees and costs, but the district court denied the motion, finding that Defendant had a sufficient "objectively reasonable basis" for removal. *Id.*

[132] 476 F.3d 29 (1st Cir. 2007).

claims that Defendant airlines[133] improperly withheld fees and taxes collected as part of the purchase of "non-refundable" passenger tickets after they failed to use the tickets for travel.[134] Plaintiffs originally filed suit in Massachusetts state court, however, Defendants removed the action to the U.S. District Court for the District of Massachusetts.[135] The district court granted Defendants' motion to dismiss the claims as preempted by the ADA[136] and Plaintiffs appealed.[137]

Plaintiffs' "core theory" was that the word "nonrefundable" related only to passenger ticket base fares and not to the associated fees and taxes.[138] Although the First Circuit noted that "[P]laintiffs cloaked this theory in pleochroic raiment" by claiming, *inter alia*, breach of contract, breach of the covenant of good faith and fair dealing, breach of fiduciary duty and civil conspiracy, the sole federal claim was an implied right of action under federal regulations.[139] Specifically, Plaintiffs argued that Defendants' retention of the fees violated federal regulations, most notably 14 C.F.R. § 253.7, which provides, in pertinent part:

> A passenger shall not be bound by any terms restricting refunds of the ticket price, imposing monetary penalties on passengers, or permitting the carrier to raise the price, unless the passenger receives conspicuous written notice of the salient features of those terms on or with the ticket.[140]

Plaintiffs contended that Defendant airlines failed to provide them notice that they would forfeit their fees if they did not utilize their tickets and, because "the regulations' goal is to protect consumers . . . it is appropriate to imply a private right of action."[141] The First Circuit rejected Plaintiffs' argument, stating

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[133] Plaintiffs' amended complaint named thirteen airlines, the FAA, and two trade associations as Defendants. *Id.* at 31–32.

[134] *Id.* at 31.

[135] *See id.*

[136] 49 U.S.C. § 41713(b)(1) (2000).

[137] *Buck*, 476 F.3d at 32.

[138] *Id.* at 31.

[139] *Id.* at 32–33 (citing 14 C.F.R. §§ 253.4, 253.7 (2008)).

[140] *Id.* at 32 (quoting 14 C.F.R. § 253.7). Plaintiffs also alleged that Defendant's actions were in violation of 14 C.F.R. § 158.5 (2008) (passenger facility charges); 19 C.F.R. § 24.22(g)(1) (2008) (customs fees); 8 C.F.R. § 286.2 (2008) (immigration fees); 7 C.F.R. § 354.3(f) (2008) (agricultural quarantine fees); 49 C.F.R. § 1510.5 (2007) (security fees); "and charges on behalf of foreign sovereigns." *Id.*

[141] *Id.* at 33.

that "[r]egulations alone cannot create private rights of action; the source of the right must be a statute."[142] The First Circuit noted that "[e]very court faced with the question of whether a consumer protection provision of the ADA allows the implication of a private right of action against an airline has answered the question in the negative," and refused to create a circuit split on the issue.[143] The First Circuit thus held Plaintiffs could not pursue their federal claims because "the consumer protection provisions of the ADA do not permit the imputation of a private right of action against an airline," and turned to the question of preemption.[144]

The First Circuit noted that, as the federal law cause of action failed, Plaintiffs were "relegated to their array of state law claims."[145] Plaintiffs argued that their claims were not preempted by the ADA's express preemption provision, which "declares that no state may 'enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of the air carrier.'"[146] The First Circuit noted that there is "considerable guidance as to how this preemption provision should be construed."[147] In *Morales v. Trans World Airlines, Inc.*,[148] the Supreme Court discussed the breadth of the ADA's express preemption provision and specifically "held that the provision should be construed broadly."[149] The Supreme Court subsequently reaffirmed this holding in *American Airlines, Inc. v. Wolens*,[150] and the First Circuit had previously held that "the ADA preempts both laws that explicitly refer to an airline's prices and those that have a significant effect upon prices."[151] However, the Supreme Court, in *Wolens*, also "carved out an exception" that avoids preemption "for 'suits alleging no violation of state-imposed obligations, but seeking recovery

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[142] *Id.* (citing Alexander v. Sandoval, 532 U.S. 275, 291 (2001); Iverson v. City of Boston, 452 F.3d 94, 100 (1st Cir. 2006)).

[143] *Id.* at 34 (citing Casas v. Am. Airlines, Inc., 304 F.3d 517, 522 n.7 (5th Cir. 2002); Statland v. Am. Airlines, Inc., 998 F.2d 539, 540–41 (7th Cir. 1993)).

[144] *Id.*

[145] *Id.*

[146] *Id.* at 34 (quoting 49 U.S.C. § 41713(b)(1) (2000)).

[147] *Id.*

[148] 504 U.S. 374, 384–85 (1992).

[149] *Buck*, 476 F.3d at 34 (citing *Morales*, 504 U.S. at 384–85).

[150] *Id.* at 35 (citing Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 223 (1995)).

[151] *Id.* at 34–35 (citing United Parcel Serv., Inc. v. Flores-Galarza, 318 F.3d 323, 335 (1st Cir. 2003)).

solely for the airline's alleged breach of its own, self-imposed undertakings.'"[152]

Plaintiffs' contended that the claims were not within the scope of the ADA's express preemption provision because they "s[ought] to enforce federal, not state, regulatory requirements."[153] The First Circuit was not persuaded by this "sleight of hand," stating that Plaintiffs were "attempting to invoke state remedies to further a state policy: that those who are wronged should have individualized access to the courts in order to remediate that wrong."[154] The First Circuit also rejected Plaintiffs' argument that their suit did not "affect the prices (or rates), routes, or services [of airlines], since the redress occurs only *after* the prices (or rates), routes, and services have been determined by the Air Industry."[155] The First Circuit further stated that:

> It is freshman-year economics that higher prices mean lower demand, and that consumers are sensitive to the full price that they must pay, not just the portion of the price that will stay in the seller's coffers. For that reason, an airline must account for the fees when setting its own rates. It follows that a finding for plaintiffs in this case would impact base fares—and since past judgments affect future behavior, this is as true of the retrospective relief requested by the plaintiffs as it is of the prospective relief that they request.[156]

Accordingly, the First Circuit noted that there was an "inevitability of a finding of preemption" and turned its attention to focus on Plaintiffs' argument that their claims qualified for the *Wolens* breach of contract exception.[157]

With respect to Plaintiffs' contract claims, the First Circuit stated that "plaintiffs' amended complaint identifies only a single word—'nonrefundable'—as common to their contracts of carriage with a multitude of airlines. It seems fanciful to suggest, in the circumstances of this case, that the word 'nonrefundable' alone can anchor a breach of contract claim."[158]

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[152] *Id.* at 35 (quoting *Wolens*, 513 U.S. at 228).

[153] *Id.*

[154] *Id.* (citing Santagate v. Tower, 833 N.E.2d 171, 176 (Mass. App. Ct. 2005) ("discussing how Massachusetts provides an 'equitable remedy' for those without 'an adequate remedy at law'")).

[155] *Id.* (quoting Brief of the Appellants at 19–20, Buck v. Am. Airlines, Inc., 476 F.3d 29 (1st Cir. 2007), 2006 WL 3226462).

[156] *Id.* at 36.

[157] *Id.*

[158] *Id.*

Accordingly, the First Circuit affirmed the district court's order of dismissal.[159]

3. DiFiore v. American Airlines, Inc.

In *DiFiore v. American Airlines, Inc.*,[160] the U.S. District Court for the District of Massachusetts addressed an action brought by skycaps at Logan Airport in Boston, Massachusetts, arising from a $2 baggage handling fee instituted by American Airlines for curbside assistance.[161] Skycaps, as airport porters, customarily receive the major portion of their compensation through passenger tips.[162] Following the imposition of the fee, the skycaps' compensation was drastically diminished because many passengers stopped paying a tip above and beyond the $2 charge, allegedly because Defendant airline had not made clear that the $2 charge was a fee retained by the airline, rather than a tip retained by the skycaps.[163]

Plaintiffs filed this action, claiming violation of the Massachusetts Tips Law[164] and the state minimum wage law,[165] among other common law claims.[166] Defendant moved to dismiss, arguing that the ADA[167] expressly preempted Plaintiffs' claims and impliedly preempted Plaintiffs' claims under 49 U.S.C. § 41704.[168] In analyzing the preemption question, the court noted that the ADA's express preemption provision was "not unlimited" in scope, and that courts generally agreed that claims by airline employees are not usually preempted.[169] The district court cited to precedent from the Supreme Court that "explained that 'some state actions may affect airline fares in too tenuous, remote, or peripheral a manner' to have preemptive effect,"[170] and that claims for breach of contract were similarly

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159 *Id.* at 38.

160 483 F. Supp. 2d 121 (D. Mass. 2007).

161 *See id.* at 123–24.

162 *Id.* at 124.

163 *See id.*

164 MASS. ANN. LAWS ch. 149, § 152A (LexisNexis 1999 & Supp. 2008).

165 MASS. ANN. LAWS ch. 151, §§ 1, 7 (LexisNexis 1999).

166 *DiFiore*, 483 F. Supp. 2d at 123.

167 49 U.S.C. § 40101 et seq. (2000).

168 *DiFiore*, 483 F. Supp. 2d at 124, 126.

169 *Id.* at 125 (collecting cases).

170 *Id.* (quoting Morales v. Trans. World Airlines, Inc., 504 U.S. 374, 390 (1992)).

not preempted because the ADA did not prohibit recovery for an airline's self-imposed obligations.[171]

The district court explained that Plaintiffs' wage-related claims were issues of employment law, an area that has been traditionally subject to state regulation and thus subject to a "heightened presumption against preemption."[172] Further, the court reasoned that because the Massachusetts Tips Law states that voluntary tips belong to the employee, not the employer, the law could have only a limited relationship with airline pricing, routes, or services.[173] The court therefore concluded that the state employment laws at issue were too tenuously related to airline prices, routes, or services to fall within the scope of the ADA's express preemption provision.[174]

Turning to the implied preemption analysis, the court found that the Massachusetts Tips Law was not preempted, either by implied conflict preemption or implied field preemption, because it is essentially unrelated to 49 U.S.C. § 41704.[175] Under § 41704, a carrier is allowed to impose "reasonable charges and conditions" to cover its potential liability for the loss or damage to passenger's property that is checked because it is not allowed onboard the aircraft pursuant to U.S. law or regulations.[176] Defendant argued that the $2 fee was a reasonable fee within the scope of § 41704, because it was designed to offset additional fees that carriers were required to pay the Transportation Security Administration ("TSA") for airport security reform measures taken in the wake of the September 11th attacks.[177] Defendant further argued that the Massachusetts Tips Law conflicted with the intent of § 41704, and, apparently, that § 41704 "evinces congressional intent to occupy the field of baggage liability," raising both conflict and field preemption issues.[178]

The court rejected Defendant's arguments, noting that even if the heightened TSA screening procedures increased carriers' potential liability, this liability did not "clearly relate" to air carriers' potential liability for mandatorily stowed baggage and there-

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[171] *Id.* (citing Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 228 (1995)).

[172] *Id.* at 125–26 (citing Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 252 (1994)).

[173] *Id.* at 126.

[174] *Id. But see* Fitz-Gerald v. Skywest Airlines, Inc., 65 Cal. Rptr. 3d 913, 921–22 (App. Dep't Super. Ct. 2007).

[175] *DiFiore*, 483 F. Supp. 2d at 126–27.

[176] *Id.* at 126 (quoting 49 U.S.C. § 41704 (2000)).

[177] *Id.* at 126–27.

[178] *Id.* at 127.

fore could not support a finding of implied conflict preemption between the Massachusetts Tips Law and § 41704.[179] The court similarly rejected Defendant's field preemption argument, finding that neither the purpose nor the language of § 41704 supported the conclusion that Congress intended to occupy the field of baggage liability to the extent that state laws relating to airline employment issues were preempted.[180] Accordingly, the court determined that Defendant "ha[d] failed to overcome the presumption against preemption" and denied Defendant's motion to dismiss.[181]

4. Aloha Airlines, Inc. v. Mesa Air Group, Inc.

The decision of the U.S. District Court for the District of Hawaii in *Aloha Airlines, Inc. v. Mesa Air Group, Inc.*[182] involved, *inter alia*, the alleged breach of a confidentiality agreement between air carriers.[183] Plaintiffs, two local airlines, served the Hawaiian Islands and controlled (along with a third airline uninvolved in the litigation) the majority of local service.[184] In 2006, Defendant airline entered the market and began to offer below-cost, inter-island flights, allegedly in an attempt to monopolize the market and drive Plaintiffs out of business.[185]

Plaintiffs filed for bankruptcy in December 2004, allegedly after discovering Defendant had conducted a study and was advised to enter the market and force Plaintiffs out.[186] Subsequently, Plaintiffs and Defendant began negotiations regarding potential investment opportunities, entering into two different confidentiality agreements in the process.[187] Under the agreements, Plaintiffs allowed Defendant access "to confidential and proprietary trade secrets and commercial information" and Defendant was barred from utilizing the information for any purpose other than potential investment.[188] Thereafter, Defendant entered the market and began offering low-cost ser-

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179 *Id.*

180 *Id.* (citing, *inter alia*, Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947)).

181 *Id.* at 127–28 (citing N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 654 (1995); Summit Inv. & Dev. Corp. v. Leroux, 69 F.3d 608, 610 (1st Cir. 1995)).

182 CV No. 07-00007 DAE-MBK, 2007 WL 842064 (D. Haw. Apr. 2, 2007).

183 *Id.* at *1–*2.

184 *Id.* at *1.

185 *Id.* at *1–*2.

186 *Id.* at *1.

187 *Id.*

188 *Id.*

vice, allegedly aided by information obtained under these agreements.[189]

Plaintiffs filed suit in the district court, alleging breach of contract because Defendant misused confidential information obtained under the agreements, fraud, and attempted monopolization and predatory pricing in violation of the Sherman Act, and sought monetary damages and equitable relief.[190] Defendant moved to dismiss the contract and fraud claims, arguing that they were preempted by the ADA, but did not challenge Plaintiff's Sherman Act claims.[191]

In reviewing Defendant's preemption argument, the district court began by quoting the ADA's preemption provision:

> Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not *enact or enforce a law, regulation, or other provision* having the force and effect of law *related to* a *price, route or service* of an air carrier that may provide air transportation under this subpart.[192]

The district court then examined this provision in light of the Supreme Court's decision in *Morales v. Trans World Airlines, Inc.*[193] In *Morales*, the Supreme Court found that "the ADA preempted guidelines for airline fare advertising."[194] Specifically, *Morales* broadly interpreted the phrase "related to" as used in the ADA's preemption provision.[195]

However, the district court noted that *Morales* did not "set down a blanket rule preempting state law claims; rather, it left open the possibility that the ADA would not preempt nonprice-related claims or any other state claim that is 'too tenuous, remote or peripheral' . . . to have pre-emptive effect."[196] The district court further noted that in *American Airlines, Inc. v. Wolens*,[197] the Supreme Court had specifically "excluded breach of contract claims from preemption" and, accordingly, "under *Wolens*, a party may seek relief under state contract law from an airline that has 'dishonored a term the airline itself stipulated' in a contract, without fear of enlarging or enhancing rights

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189 *Id.* at *2.
190 *Id.*
191 *Id.* at *3.
192 *Id.* (quoting 49 U.S.C. § 41713(b)(1) (2000)).
193 *Id.* (citing Morales v. Trans. World Airlines, Inc., 504 U.S. 374 (1992)).
194 *Id.* (citing *Morales*, 504 U.S. at 390–91).
195 *Id.*
196 *Id.* (citing *Morales*, 504 U.S. at 390).
197 513 U.S. 219, 232 (1995).

under the ADA 'based on state laws or policies external to the agreement.'" [198] Defendant attempted to distinguish *Wolens* and argued that "it created a narrow exception" that had been further restricted by subsequent case law, citing to, *inter alia*, *Buck v. American Airlines, Inc.*[199] The district court rejected the argument, finding the cases cited were inapposite because "[n]one of those situations mirror that presented here, where [Plaintiffs'] claim is based on express, contractual provisions that are nothing but contractual in nature."[200] Furthermore, the district court found that Plaintiffs' claims furthered the policies underlying the ADA, *i.e.*, deregulation, because Defendant's alleged misappropriation of confidential proprietary information in order to overpower competitors, if true, essentially cheated the system.[201]

Defendant, however, contended that two federal defenses "provide[d] another avenue for its preemption argument."[202] First, that the ADA granted it the right of entry into the market, by whatever means, because it encouraged entry into the air transportation market (a public interest);[203] and, second, that several Department of Transportation regulations[204] relating to pricing requirements for "interstate and overseas air transportation," applied to travel within the Hawaiian islands and preempted Plaintiff's state law claims.[205] The district court noted that Defendant appeared to "contend that, because it raises federal defenses that 'arise from law external to the terms of the contract itself, the ADA preempts the claims under *Wolens*.'"[206]

In this regard Defendant cited *Delta Air Lines, Inc. v. Black*[207] and *Smith v. Comair*.[208] The district court was not persuaded and found these cases distinguishable because they both involved boarding procedures, and explained that as found in *Black*, "to allow state common law to govern such actions could open the

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198 *Aloha Airlines*, 2007 WL 842064, at *4 (quoting *Wolens*, 513 U.S. at 232).

199 *Id.* (citing Buck v. Am. Airlines, Inc., 476 F.3d 29, 36 (1st Cir. 2007); Breitling U.S.A., Inc. v. Fed. Express Corp., 45 F. Supp. 2d 179, 184 (D. Conn. 1999); and Stone v. Cont'l Airlines, Inc., 905 F. Supp. 823, 826 (D. Haw. 1995)).

200 *Id.*

201 *Id.* at *5.

202 *Id.*

203 49 U.S.C. § 40101(a)(13) (2000).

204 *Aloha Airlines*, 2007 WL 842064, at *5 (citing 14 C.F.R. § 253.7 (2008)).

205 *Id.*

206 *Id.*

207 116 S.W.3d 745, 754–56 (Tex. 2003).

208 134 F.3d 254, 257 (4th Cir. 1998).

door to 'extensive multi-state litigations, launching inconsistent assaults on federal deregulation in the airline industry, every time an airline reassigned a passenger's seat.'"[209] However, the district court found that Plaintiffs' breach of the confidentiality agreement claim did not involve any standard airline service under the ADA, and thus did not directly implicate any defenses under federal law, as was the case in *Comair*.[210] Further, the district court found that the defenses actually raised were only indirectly related to Plaintiffs' claim, and to allow such defenses to escape the *Wolens* exception and find preemption under the ADA would incite future airline-defendants "to think of creative federal defenses external to the terms of the contract, in any contract case involving airlines, to invoke the ADA's preemption provision and to avoid the *Wolens* breach of contract exception."[211] The district court also rejected Defendant's argument that the claims also should be preempted because the measure of damages sought would force the court to look beyond the contract to airline prices and service, explaining that it is the nature of the claim that is germane to the preemption analysis, not the nature of the remedy.[212]

Defendant next argued that Plaintiffs' claims for breach of the implied covenant of good faith and fair dealing were preempted by the ADA.[213] The district court rejected this argument as well, relying on the Ninth Circuit's decision in *West v. Northwest Airlines, Inc.*,[214] which "upheld a claim for breach of implied warranty and fair dealing for compensatory damages, though not for punitive damages, because the claim was 'too tenuously connected to airline regulation to trigger preemption under the ADA.'"[215] The district court rejected Defendant's attempts to distinguish *West*, finding Plaintiffs' claim to be "just as tenuously connected to airline prices, routes, or services"[216] The Defendant's reliance on several "out-of-district cases," as the district court noted, was misplaced because each case involved attempts to "extend or to contradict the terms of the contract," rather than to enforce express contractual terms, as here.[217]

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209 *Id.* (quoting *Black*, 116 S.W.3d at 756).
210 *Id.* at *6.
211 *Id.*
212 *Id.*
213 *Id.* at *7.
214 995 F.2d 148 (9th Cir. 1993).
215 *Aloha Airlines*, 2007 WL 842064, at *7 (quoting *West*, 995 F.2d at 151).
216 *Id.* at *7, *9.
217 *Id.* at *8 (collecting cases).

Thus, the district court found "no reason to distinguish the Ninth Circuit's decision in *West*, which permits claims of breach of the implied covenant of good faith and fair dealing where such claims are tenuously connected to an airline's prices, routes, or services," and found that the ADA did not preempt Plaintiffs' claim.[218]

The district court similarly found that Plaintiffs' claims for fraudulent inducement, punitive damages, and injunctive relief were not preempted by the ADA because of the tenuous relationship between Plaintiffs' claims and Defendant's "prices, routes, and services."[219] Accordingly, the district court denied Defendant's motion to dismiss.[220]

5. *Miller v. Raytheon Aircraft Co.*

The decision in *Miller v. Raytheon Aircraft Co.*[221] involved a wrongful discharge claim brought by a former pilot-employee against his former employers.[222] Plaintiff alleged that he was fired because he refused to fly certain aircraft on multiple occasions because the aircraft did not meet the Minimum Equipment List ("MEL") standard in accordance with FAA regulations.[223] Defendants alleged that there were additional grounds supporting the decision to terminate Plaintiff's employment, including a complaint about his behavior toward a female flight attendant.[224]

Plaintiff filed suit claiming wrongful discharge, "breach of employment contract, promissory estoppel, fraud, negligent misrepresentation, civil conspiracy, intentional infliction of emotional distress, negligence, and wage and hour violations."[225] The trial court granted summary judgment in favor of Defendants, finding, *inter alia*, that Defendants had established

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218 *Id.* at *9.

219 *Id.* at *9–*12.

220 *Id.* at *13.

221 229 S.W.3d 358 (Tex. App.–Houston [1st Dist.] 2003, no pet.).

222 *Id.* at 363–64. Plaintiff's complaint named several corporate Defendants, namely Raytheon Aircraft Co. ("RAC"), Raytheon Travel Air, and Flight Options, LLC ("FOC") because, due to corporate restructuring and a series of mergers, the company that had initially hired Plaintiff, RAC, was not the party that fired him, FOC. *Id.* The court addressed the claims against each series of corporate Defendants separately, but for clarity's sake this summary will not focus on the corporate issues before the court.

223 *Id.* at 364–65.

224 *Id.* at 364.

225 *Id.* at 365.

other grounds for Plaintiff's discharge claims besides refusal to perform illegal acts and that Plaintiff's claims were preempted by the ADA.[226] Plaintiff appealed to the Texas State Court of Appeals, First District, arguing that:

> (1) summary judgment was improper on his wrongful discharge claims under the *Sabine Pilot*[227] exception to the employment-at-will doctrine, and the trial court erred in considering hearsay in a summary judgment affidavit, (2) his wrongful discharge claims are not preempted by the Airline Deregulation Act of 1978,[228] (3) summary judgment on his breach of contract claims was improper because he was not an at-will employee, and (4) summary judgment was improper on his common law tort, conspiracy, and unpaid wages claims.[229]

Addressing Plaintiff's *Sabine Pilot* claim, the Court of Appeals began by explaining that although an employer generally may fire an employee for any reason under Texas law, absent a contrary agreement, "[i]n *Sabine Pilot Service Inc. v. Hauck*, the Texas Supreme Court recognized an exception to the employment-at-will doctrine for an employee discharged 'for the sole reason that the employee refused to perform an illegal act.'"[230] To invoke this exception, a plaintiff has the burden of proving by a preponderance of the evidence that his refusal to perform an illegal act was the sole cause for his discharge, because if an employer has any other legitimate grounds for terminating plaintiff's employment he is not liable for wrongful discharge.[231] The Court of Appeals found that, on the facts presented, the trial court had properly granted summary judgment on Plaintiff's *Sabine Pilot* claim, because the evidence presented indicated that Defendant had terminated all of its pilots due to corporate restructuring.[232]

Plaintiff further argued that the trial court had erred in dismissing his *Sabine Pilot* claim as preempted by the ADA.[233] In

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[226] *Id.* at 363–64.

[227] Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d 733 (Tex. 1985).

[228] 49 U.S.C. § 41713(b)(1) (2000).

[229] *Miller*, 229 S.W.3d at 363–64.

[230] *Id.* at 367 (quoting *Sabine Pilot*, 687 S.W.2d at 735).

[231] *Id.* (citing, *inter alia*, Tex. Dep't of Human Servs. v. Hinds, 904 S.W.2d 629, 633 (Tex. 1995)).

[232] *Id.* at 368.

[233] *Id.* Plaintiff also argued that the ADA did not apply to his claims, because his employer was not an "air carrier" under the ADA, but presented no evidence raising a question of fact and Defendant produced an FAA certification of its status as an air carrier. *Id.* at 372.

rejecting Plaintiff's argument that his *Sabine Pilot* claim was not preempted, the Court of Appeals relied on precedent from the Supreme Court[234] and the Texas Supreme Court[235] in its analysis, and indicated that it had previously been determined that "if a court cannot adjudicate a contract claim without resort to external law, the ADA preempts the claim."[236] The Court of Appeals applied the two-part ADA preemption test set forth by the Texas Supreme Court in *Continental Airlines, Inc. v. Kiefer*.[237] Under this test, the *Kiefer* court first "examined whether the claims related to airline rates, routes, or services. Second, the court examined whether the claims constituted the enactment or enforcement of a state law, rule, regulation, standard, or other provision."[238]

Applying this test, the Court of Appeals first found that, under the Supreme Court's broad interpretation of claims "related to" airline rates, routes, and services under the ADA, Plaintiff's refusal to fly, resulting in grounding aircraft, "directly affected [Defendant] FOC's point-to-point transportation services."[239] Next, the Court of Appeals found that allowing Plaintiff to pursue his *Sabine Pilot* claim and seek money damages for wrongful termination because of his refusal to perform an illegal act (*i.e.*, to fly an aircraft in violation of FAA regulations) would constitute the enactment or enforcement of state law relating to airline services.[240] Despite contrary Texas state public policy relating to *Sabine Pilot* wrongful termination claims, the Court of Appeals held that Plaintiff's specific claims were preempted by the ADA, but noted the narrowness of its holding because of its belief the ADA would not preempt *Sabine Pilot* claims unrelated to an air carrier's prices, routes, or services.[241]

The Court of Appeals similarly found that the trial court properly granted summary judgment on Plaintiff's remaining con-

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[234] *Id.* at 369–70 (citing Am. Airlines, Inc. v. Wolens, 513 U.S. 219 (1995); Morales v. Trans. World Airlines, Inc., 504 U.S. 374 (1992)).

[235] *Id.* at 370–72 (citing Delta Air Lines, Inc. v. Black, 116 S.W.3d 745 (Tex. 2003); Cont'l Airlines, Inc. v. Kiefer, 920 S.W.2d 274 (Tex. 1996)).

[236] *Id.* at 370 (collecting cases).

[237] *Id.* at 372–74 (*Kiefer*, 920 S.W.2d at 281–82).

[238] *Id.* at 370.

[239] *Id.* at 372–73 (citing *Morales*, 504 U.S. at 384).

[240] *Id.* at 374.

[241] *Id.* at 373–75. As the Court of Appeals stated, "[a] Sabine Pilot claim represents a policy determination by the State of Texas that an employee terminated for refusing to perform a criminal act should have a tort action against his employer." *Id.* at 373.

tract and common law claims.[242] For example, Plaintiff alleged that he was not employed at-will, but the court found that the evidence presented "including the offer letter and employment agreements, . . . does not indicate any intent on the part of [Defendants] to be bound not to terminate [Plaintiff] except under clearly specified circumstances."[243] Because Plaintiff failed to establish any contractual employment agreement, he could not claim breach of contract.[244] Accordingly, the Court of Appeals affirmed the trial court's orders granting summary judgment.[245]

6. Ing v. American Airlines, Inc.

In *Ing v. American Airlines, Inc.*,[246] the U.S. District Court for the Northern District of California addressed claims arising out of the death of a two-year-old English bulldog following air transportation as cargo from New York to San Francisco.[247] It was undisputed that the dog was alive upon arrival at San Francisco.[248] However, the dog was lethargic and breathing shallowly.[249] Plaintiff, the dog's owner, discovered the dog's condition after going to retrieve him from the "baggage area," and immediately requested to take him to a veterinarian.[250] However, Defendant's cargo agent refused to release the dog until a veterinarian had performed a necropsy.[251] It was undisputed that "four or five hours" passed between when Plaintiff asked Defendant for his dog and when the dog actually was returned.[252] The dog died during that time.[253] It was undisputed that the dog was not given veterinary care prior to its return to Plaintiff.[254]

Plaintiff had filed an action in the Superior Court claiming "negligence, gross negligence, trespass to chattel, conversion . . . intentional infliction of emotional distress . . . breach of bailment contract, breach of contract" and violations of sections of

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242 *Id.* at 384.
243 *Id.* at 377.
244 *Id.* at 377–78.
245 *Id.* at 384.
246 No. C 06-02873 WHA, 2007 WL 420249 (N.D. Cal. Feb. 5, 2007).
247 *Id.* at *1.
248 *Id.* at *8.
249 *Id.* at *1–*2.
250 *Id.* at *2.
251 *Id.*
252 *Id.* at *8.
253 *Id.* at *2.
254 *Id.* at *8.

the California Civil Procedure and California Business and Professions Codes.[255] Defendant removed the case to the district court and then moved for summary judgment as to its responsibility for Plaintiff's damages or, alternatively, partial summary judgment limiting its liability to $50 under the terms of the air waybill.[256]

The district court noted that "[h]istorically, federal common law applied to claims of loss of or damage of goods [transported] by interstate common carriers."[257] It observed that the U.S. Court of Appeals for the Ninth Circuit had ruled that the ADA "did not preempt 'run-of-the-mill-contract' personal injury claims or routine contract claims," but that claims relating to the "loss or damage to shipped goods fit into neither category."[258] The district court found that Plaintiff's claims other than his breach of contract claim were preempted "at least for the time that the dog was in transit."[259] In so finding, the district court rejected Plaintiff's argument that his claim under the California Business and Professions Code was not preempted because, according to Plaintiff, it arose from a violation of the Animal Welfare Act,[260] a federal law.[261] The district court found that the Animal Welfare Act provided no private right of action, but rather, "at most," a standard of care.[262]

With respect to Plaintiff's breach of contract claim, the district court first examined the validity of Defendant's air waybill liability limitation.[263] The district court noted that the air waybill was the contract between the shipper and the air carrier,[264] and a provision limiting a carrier's liability is "prima facie valid if the face of the contract (or, in this case, air waybill) recites the liability limitation and the means to avoid it."[265] The district court

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255 *Id.* at *3.

256 *Id.* at *1, *3.

257 *Id.* at *3 (citing Deiro v. Am. Airlines, Inc., 816 F.2d 1360, 1365 (9th Cir. 1987)).

258 *Id.* at *3 (quoting Read-Rite Corp. v. Burlington Air Express, Ltd., 186 F.3d 1190, 1197 (9th Cir. 1999)).

259 *Id.* at *4 (citing Se. Exp. Co. v. Pastime Amusement Co., 299 U.S. 28, 30 (1936)).

260 7 U.S.C. § 2131 et seq. (2000).

261 *Ing*, 2007 WL 420249, at *4.

262 *Id.*

263 *Id.*

264 *Id.* (citing S. Pac. Transp. Co. v. Commercial Metals Co., 456 U.S. 336, 342–43 (1982)).

265 *Id.* at *4 (quoting Read-Rite Corp. v. Burlington Air Express, Ltd., 186 F.3d 1190, 1198 (9th Cir. 1999)).

noted that the subject air waybill allowed the shipper to "opt out" of the limited liability provision by declaring the value of the goods and paying a higher rate for the shipment.[266] The court found that Defendant's provision established a prima facie showing that the limit applied, as the face of the air waybill provided space for the shipper to declare a higher value for the goods and Defendant to impose a correspondingly higher fee.[267]

Finding a prima facie showing of validity, the court then turned to the next step in the analysis of the validity of the limitation, the "released-valuation doctrine."[268] The released-valuation doctrine provides that a shipper "'is deemed to have released the carrier from liability beyond the amount stated' in exchange for a low shipping rate."[269] Under the doctrine, the shipper is bound by its release so long as it "(1) has reasonable notice of the rate structure; and (2) is given a fair opportunity to pay a higher rate in order to obtain greater protection."[270] The face of the air waybill provided, in pertinent part:

> This non-negotiable air waybill is a contract governed by law and by the provisions, on the reverse side. Such provisions, among other things, exclude or limit the carrier's liability for loss, damage, or delay in certain instances.[271]

The reverse side of the air waybill provided that Defendant's liability was limited to:

> "50 cents per pound per shipment (but not less than USD 50.00) unless a higher value (not to exceed USD 1500.00) is declared on the Air Waybill at the time of acceptance by the Carrier, and the applicable charges pertaining to such higher value have been paid by the shipper."[272]

The district court noted that the language on the face of the air waybill was "highlighted with a contrasting background and appeared just above the line for the shipper's signature" and referred the shipper to the "actual provisions" on the reverse

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266 *Id.*

267 *Id.*

268 *Id.* The court rejected Plaintiff's argument that the provision also was subject to the reasonable communicativeness doctrine, which applies to limitations of liability for checked baggage, because Plaintiff had chosen to ship the dog as Priority Parcel instead of checked baggage. *Id.*

269 *Id.* at *5 (quoting Deiro v. Am. Airlines, Inc., 816 F.2d 1360, 1365 (9th Cir. 1987)).

270 *Id.* (quoting *Deiro*, 816 F.2d at 1365).

271 *Id.*

272 *Id.* at *1.

side which provided that additional liability coverage could be purchased at an additional charge.[273] In addition, the left portion of the face of the waybill contained a blank where the shipper could declare a value and an additional space "next to that" where an "excess value fee" could be added to the shipping charges based on this declared value.[274] Noting that reasonableness of notice is a question of law for the court, the district court concluded that the language was sufficiently conspicuous to put a shipper on notice of the limitation.[275]

Plaintiff then had the burden to show that he was not afforded a fair opportunity to purchase additional coverage.[276] The shipper, whom the court found to be acting as the Plaintiff's agent in shipping the dog, argued that she was not expressly informed of this option during the transaction.[277] Nonetheless, the court found that the terms of the waybill were sufficient to provide a fair opportunity to avoid the limitation.[278] Because Plaintiff did not meet his burden to show denial of a fair opportunity to obtain greater coverage, the court found the limited liability provisions were presumptively valid and enforceable unless subsequently invalidated by acts of the carrier.[279]

The district court went on to note that the U.S. Court of Appeals for the Ninth Circuit had held that a limited liability provision shields carriers from liability for any form of negligence, even gross negligence.[280] The district court noted that because shippers have the option of purchasing additional coverage, "nothing short of intentional destruction or conduct in the nature of theft of the property will permit a shipper to circumvent [valid] liability limitations."[281] Plaintiff argued that Defendant's conduct in refusing to release the dog after his request constituted conversion, nullifying the limitation on liability.[282] The district court, accepting Plaintiff's factual allegations as true, stated that Defendant's refusal to return the dog to Plaintiff for

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273 *Id.* at *5.

274 *Id.*

275 *Id.* (citing *Deiro*, 816 F.2d at 1364).

276 *Id.* (citing *Deiro*, 816 F.2d at 1365).

277 *Id.* at *5–*6.

278 *Id.* at *6.

279 *Id.*

280 *Id.* (citing *Deiro*, 816 F.2d at 1366).

281 *Id.* (quoting Am. Cyanamid Co. v. New Penn Motor Express, Inc., 979 F.2d 310, 315–16 (3d Cir. 1992)).

282 *Id.*

veterinary care, caused or contributed to the dog's death.[283] The district court then found that "[a] reasonable jury could conclude that American committed conversion by not releasing the dog to [Plaintiff] until after it was dead . . . [and, if it] concluded that American's conduct was intentional, the limited liability provision would not apply."[284]

Plaintiff further argued that the liability limitations of the air waybill did not apply because Defendant had breached its tariff, which the air waybill incorporated by reference.[285] The tariff provided that "pug- or snub-nosed dogs 'will be refused tender if the temperature at any point in their journey is 75°F (22.5°C) or higher.'"[286] The tariff, however, incorrectly converted Fahrenheit to Celsius, as 22.5°C converts to 72.5°F.[287] Defendant, during litigation, described this policy as "calling for the refusal of transport of pug-nosed dogs if the temperature exceeds 75°F or 24°C (which is very close to 75°F)."[288]

Plaintiff alleged that the temperature was between 75°F and 78°F and, therefore, claimed that Defendant had breached its tariff by shipping the dog despite the fact that the air temperature at JFK exceeded the maximum allowable for shipment of snub-nosed dogs.[289] Defendant contended that the temperature was "at or below 75°F."[290] However, the district court noted that because "the carrier is the tariff's author, ambiguities in its language must be strictly construed against the carrier," and thus concluded that the lower stated temperature controlled.[291] As such, it found that a jury could conclude that the temperature exceeded the lower limit (72.5°F) set forth by the tariff.[292] The district court noted that Defendant could not enforce the provisions of a contract it had violated, and found that the facts of the case raised triable issues of fact on the breach of contract issues.[293]

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283 *Id.*

284 *Id.*

285 *Id.* at *2, *7.

286 *Id.* at *2.

287 *Id.*

288 *Id.*

289 *Id.* at *2, *7.

290 *Id.* at *2.

291 *Id.* at *7 (quoting Komatsu Ltd. v. States S.S. Co., 674 F.2d 806, 811 (9th Cir. 1982)).

292 *Id.*

293 *Id.*

Plaintiff's final argument was "that the air waybill and federal common law ceased to apply after he demanded receipt of his dog," and that Defendant's subsequent conduct provided a separate basis for liability.[294] The court found that this argument also raised triable issues of fact precluding summary judgment, as "[i]t defies logic to think that the air waybill still insulates American from liability after it refuses to return property to the consignee."[295] Accordingly, the district court granted Defendant's motion for summary judgment in part and denied it in part holding that: (1) all of Plaintiff's claims for harm incurred while the dog was in transit were preempted by federal common law, with the exclusion of breach of contract; (2) the air waybill's limited liability provision was valid and enforceable unless Plaintiff established that Defendant "intentionally interfered with possession of the dog" or breached its contract; and (3) a reasonable jury could conclude that Defendant's acts following the arrival of the dog at the airport "constituted a separate incident not covered by the air waybill."[296]

B. Federal Aviation Act of 1958

The Federal Aviation Act of 1958[297] ("Federal Aviation Act") was enacted in response to "a series of fatal air crashes between civil and military aircraft operating under separate flight rules."[298] The Federal Aviation Act was intended "to promote safety in aviation and thereby protect the lives of persons who travel on board aircraft"[299] and "to create and enforce one unified system of flight rules."[300] The U.S. Court of Appeals for the Ninth Circuit has stated that the Act "illustrates Congress' intent to make the Federal Aviation Administration the sole arbiter of air safety."[301]

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294 *Id.* at *8.

295 *Id.*

296 *Id.*

297 49 U.S.C. § 40103 (2000).

298 Montalvo v. Spirit Airlines, 508 F.3d 464, 471 (9th Cir. 2007) (citing United States v. Christensen, 419 F.2d 1401, 1404 (9th Cir. 1969)).

299 *Id.* (quoting *In re* Mex. City Aircrash of Oct. 31, 1979, 708 F.2d 400, 406 (9th Cir. 1983)).

300 *Id.* (quoting *Christensen*, 419 F.2d at 1404).

301 *Id.* at 472.

1. In re Air Crash at Lexington, Kentucky, August 27, 2006

In *In re Air Crash at Lexington, Kentucky, August 27, 2006*,[302] the U.S. District Court for the Eastern District of Kentucky addressed Plaintiffs' motions to remand wrongful death actions arising out of the crash of Comair Flight 5191 in Lexington, Kentucky, on August 27, 2006, that had been removed to federal court.[303] Plaintiffs had filed actions in Fayette Circuit Court against "various Comair corporate entities" (collectively "Defendant").[304] Defendant's removal was based upon alleged federal question jurisdiction because "federal law governs the Plaintiff's right of recovery and because Plaintiff's Complaint includes allegations that raise a substantial issue of federal law."[305] Plaintiffs' actions were consolidated for "pretrial purposes."[306]

Plaintiffs subsequently moved to remand.[307] In addressing the motions, the court stated that the "critical issue" was "whether there is original federal question jurisdiction to support the removal of these cases from state court."[308] In their motions, Plaintiffs argued that: their wrongful death actions were "created by state law, not federal law," and that they relied on state law for relief; that no federal question was set forth on the face of their complaints; that as "master of their complaints," they were "entitled to maintain their actions in state court;" that the defense of preemption did not support jurisdiction in federal court; and that Defendant "failed to demonstrate Congressional intent to preempt completely all state law causes of action."[309]

In examining Defendant's removal, the district court noted that under the well-pleaded complaint rule, a federal question must be presented "on the face of the plaintiff's properly pleaded complaint."[310] Further, the district court noted that "'[i]t is settled law that 'a case may *not* be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal de-

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[302] 486 F. Supp. 2d 640 (E.D. Ky. 2007).

[303] *Id.* at 642.

[304] *Id.*

[305] *Id.*

[306] *Id.*

[307] *Id.*

[308] *Id.* at 647.

[309] *Id.* at 644.

[310] *Id.* (quoting Caterpillar, Inc. v. Williams, 482 U.S. 386, 391 (1987)).

fense is the only question truly at issue.'"[311] The two "narrow" exceptions to the well-pleaded complaint rule occur if "(1) federal law completely preempts the state-law claims; or (2) the state-law claims raise substantial questions of federal law."[312]

In evaluating Plaintiffs' motions, the district court addressed, *inter alia*, express preemption, implied ordinary preemption and implied complete preemption.[313] In considering express preemption, the district court stated that the ADA amended the Federal Aviation Act to set forth an "express prohibition against enactment or enforcement of state laws, rules, regulations, standards, or other provisions 'having the force and effect of law relating to rates, routes, or services of any air carrier.'"[314] However, the district court noted that Defendant did not claim that Plaintiffs' claims were preempted by the ADA's express preemption clause and that "[a] number of courts ha[d] rejected arguments that the ADA expressly preempt[ed] various state law claims."[315]

The district court then turned to implied "ordinary" preemption.[316] It stated that a federal statute can "implicitly override[ ] state law either when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively . . . or when state law is in actual conflict with federal law."[317] Further, "congressional intent to supersede state laws must be 'clear and manifest.'"[318]

It noted that implied preemption may be ordinary or complete.[319] Ordinary preemption will provide a basis for preemption if the federal law that allegedly preempts state law "is alleged in a well-pleaded complaint."[320] It will not provide a basis for removal, however, if plaintiff framed the complaint "based solely on state law" and preemption was only raised as a defense by defendant.[321]

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311 *Id.* at 645 (quoting Roddy v. Grand Trunk W.R.R., Inc., 395 F.3d 318, 322 (6th Cir. 2005)).

312 *Id.* (citing Palkow v. CSX Transp., Inc., 431 F.3d 543, 552 (6th Cir. 2006); Dunlap v. G & L Holding Group, Inc., 381 F.3d 1285, 1290 (11th Cir. 2004)).

313 *Id.* at 645–46, 648, 654.

314 *Id.* at 645 (quoting 49 U.S.C. § 41713(b)(1) (2000)).

315 *Id.* at 646 (collecting cases).

316 *Id.*

317 *Id.* (quoting Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995)).

318 *Id.* (quoting English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990)).

319 *Id.*

320 *Id.* at 647.

321 *Id.*

Defendant argued that there was "evidence of Congressional intent for the standard of care for airline safety to be uniform and to be exclusively determined by federal law."[322] The district court, however, stated that whether there was ordinary preemption was not at issue, rather the issue was whether there was "original federal question jurisdiction" to support removal.[323] The district court rejected Defendant's heavy reliance on, *inter alia,* the decision of the U.S. Court of Appeals in *Abdullah v. American Airlines, Inc.*,[324] which held that "federal law establishes the applicable standards of care in the field of air safety."[325] The district court stated that under *Abdullah* "state law remedies or causes of action remain[ed] available, despite ordinary preemption of the standard of care" and, furthermore, *Abdullah* contained no discussion "regarding the jurisdiction of the federal court, but the holding itself precludes a complete preemption decision."[326] Thus, after "carefully" considering the case law relied upon by Defendant relating to ordinary preemption, the district court held that those authorities were irrelevant to whether it had original jurisdiction over the removed cases.[327]

The district court then considered whether there was original jurisdiction pursuant to implied complete preemption.[328] After engaging in an analysis of several decisions addressing complete preemption,[329] the district court found that:

> In summary, "complete" preemption replaces not only state substantive law with federal law, but also replaces state causes of action with claims "arising under" federal law. Because of the serious implications regarding the Constitutional allocation of authority between state and federal courts, there must be a clear manifestation of congressional intent for federal law to supersede both state substantive law and state causes of action to create federal removal jurisdiction. The plaintiff must remain "the

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322 *Id.*

323 *Id.*

324 181 F.3d 363 (3d Cir. 1999).

325 *In re Air Crash at Lexington,* 486 F. Supp. 2d at 648 (quoting *Abdullah,* 181 F.3d at 368).

326 *Id.* (citing *Abdullah,* 181 F.3d at 368).

327 *Id.* (citing, *inter alia,* City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973)).

328 *Id.*

329 *Id.* at 648–50 (citing Palkow v. CSX Transp. Inc., 431 F.3d 543 (6th Cir. 2006); Roddy v. Grand Trunk W.R.R., Inc., 395 F.3d 318 (6th Cir. 2005); Musson Theatrical, Inc. v. Federal Express Corp., 89 F.3d 1244 (6th Cir. 1996)).

master of the claim," and the plaintiff's choice of forum should prevail unless there is "preemption on steroids."[330]

In determining whether the Federal Aviation Act completely preempted state law, the district court observed that until the Act was amended by the ADA, it had no express preemption clause.[331] Thereafter, the ADA expressly preempted only state law relating to "price, route or service of an air carrier," which the Supreme Court had found implied that "matters beyond that reach are not preempted."[332] The district court found that the presence of a preemption clause, while not conclusive, supported the inference that there was no implied preemption in the Federal Aviation Act.[333] Further, the district court noted that the Federal Aviation Act contained a savings clause.[334] The district court therefore concluded that the ADA's preemption clause, read in conjunction with the Federal Aviation Act's savings clause, "stops States from imposing their own substantive standards with respect to rates, routes, or services, but not from affording relief to a party who claims and proves that an airline dishonored a term the airline itself stipulated."[335]

The court noted that in the decision in *Cleveland v. Piper Aircraft Corp.*,[336] the Tenth Circuit concluded that the Federal Aviation Act did "not indicate[ ] a 'clear and manifest' intent to occupy the field of airplane safety to the exclusion of state common law. To the contrary, it appears through the savings clause that Congress has intended to allow state common law to stand side by side with the system of federal regulations it has developed."[337]

The district court distinguished the decision of the U.S. District Court for the Southern District of New York in *Curtin v. Port*

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330 *Id.* at 650.

331 *Id.*

332 *Id.* (quoting Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517 (1992)).

333 *Id.* (citing Freightliner Corp. v. Myrick, 514 U.S. 280, 288 (1995)).

334 *Id.* The district court noted that the Federal Aviation Act savings clause provided that "[n]othing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies." *Id.* n.5 (quoting 49 U.S.C. app. § 1506 (1994)). The savings clause was amended to provide: "A remedy under this part is in addition to any other remedies provided by law." *Id.* (quoting 49 U.S.C. § 40120(c) (2000)).

335 *Id.* at 650–51 (citing Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 232–33 (1995)).

336 985 F.2d 1438 (10th Cir. 1993).

337 *In re Air Crash at Lexington*, 486 F. Supp. 2d at 651 (quoting *Cleveland*, 985 F.2d at 1444).

Authority of New York,[338] which it found to be the only case that supported Defendant's preemption arguments.[339] In *Curtin*, the district court found that a state negligence claim relating to personal injuries resulting from an emergency aircraft evacuation presented a federal question and was properly removed.[340] The district court in the present matter, however, disagreed with Curtin to the extent it held that removal jurisdiction "directly follows from ordinary preemption," and noted that "a number of jurisdictions" had found that the Federal Aviation Act does not completely preempt state law causes of action.[341] Accordingly, the district court concluded that the Federal Aviation Act:

> does not completely preempt state law causes of action for wrongful death or survivor benefits in aviation cases. To the extent [Defendant] relied on [Federal Aviation Act] preemption as a basis for removal, its reliance was misplaced. This Court does not have subject matter jurisdiction based on complete preemption of wrongful death claims by the [Federal Aviation Act].[342]

In addition, Defendant contended that its removal of several actions was proper pursuant to the Warsaw Convention.[343] The district court commented that there is a split in the circuits about whether the Convention completely preempted state law causes of action, but ordered the parties to brief this issue further.[344]

The district court also considered Defendant's argument that removal was proper because Plaintiffs' claims "necessarily depend[ed] on resolution of a substantial question of federal law."[345] In this respect, the district court noted that the Supreme Court had provided that "in certain cases federal question jurisdiction will lie over state-law claims that implicate significant federal issues" but that this is not "a password opening federal courts to any state action embracing a point of federal law."[346] Rather, the issue is whether a state law claim necessarily raises a "stated federal issue, actually disputed and

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338 183 F. Supp. 2d 664 (S.D.N.Y. 2002).

339 *In re Air Crash at Lexington*, 486 F. Supp. 2d at 652.

340 *Id.* (citing *Curtin*, 183 F. Supp. 2d at 671–72).

341 *Id.* (collecting cases).

342 *Id.* at 654.

343 *Id.*

344 *Id.*

345 *Id.* (quoting Palkow v. CSX Transp., Inc., 431 F.3d 543, 552 (6th Cir. 2006)).

346 *Id.* (quoting Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 312, 314 (2005)).

substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities."[347]

The district court noted that "even when a plaintiff relies on federal law as part of a state law claim, there is not necessarily a substantial federal question to support removal jurisdiction."[348] The district court then found that Defendant had failed to identify "a single federal statute relied upon by the plaintiffs and about which the parties have any serious dispute as to its interpretation. There is no such federal statute because Plaintiffs' claims are based entirely upon state law."[349] While Defendant argued that "the substantial and disputed federal issue is whether the [Federal Aviation Act] displaces state and common law in establishing the standard of care applicable to [Defendant] under the circumstances alleged,"[350] the district court relied upon the decision of the Supreme Court in *Caterpillar, Inc. v. Williams*,[351] which stated that the presence of a federal question in a defensive argument was not sufficient to overcome the well-pleaded complaint rule, *i.e.*, that a plaintiff is the master of the complaint.[352] *Caterpillar* further provided that if a defendant could transform a state law claim into a claim arising under federal law by merely "injecting a federal question into an action" and thereby select the forum in which the claim would be litigated, plaintiff would be a "master of nothing."[353]

The district court stated that Defendant's reliance upon the U.S. District Court for the Northern District of Illinois in *Bennett v. Southwest Airlines Co.*,[354] which found that a substantial federal question was raised in an action for personal injury claims arising out of an aircraft crash, was misplaced.[355] The district court in the present matter found that, *inter alia*, the plaintiff in *Bennett*, unlike here, "specifically alleged violations of the Federal Aviation Regulations and violation of the FAA approved flight

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347 *Id.* at 654–55 (quoting *Grable*, 545 U.S. at 314).

348 *Id.* at 655.

349 *Id.*

350 *Id.* at 656.

351 482 U.S. 386 (1987).

352 *In re Air Crash at Lexington*, 486 F. Supp. 2d at 655–56 (quoting *Caterpillar*, 482 U.S. at 398–99).

353 *Id.* at 656 (quoting *Caterpillar*, 482 U.S. at 398–99).

354 No. 06 C 317, 2006 WL 1987821 (N.D. Ill. July 13, 2006), *rev'd*, 484 F.3d 907 (7th Cir. 2007).

355 *In re Air Crash at Lexington*, 486 F. Supp. 2d at 656.

manual, raising a federal issue in [the] complaint."[356] The district court concluded that Plaintiffs' motions to remand should not be denied on the ground that there was a substantial question of federal law.[357] Accordingly, the district court, *inter alia*, granted Plaintiffs' motions to remand to the extent that they were not subject to additional briefing relating to the Warsaw Convention.[358]

2. Levy v. Continental Airlines, Inc.

Levy v. Continental Airlines, Inc.[359] arose out of injuries Plaintiff allegedly sustained while traveling as a passenger onboard Defendant airline's flight from Houston, Texas, to Philadelphia, Pennsylvania, after a large ceramic bowl fell on her head from an allegedly faulty or improperly secured overhead storage bin above.[360]

Plaintiff initially filed an action for negligence in the Court of Common Pleas of Philadelphia County, but Defendant removed the action to the U.S. District Court for the Eastern District of Pennsylvania on the basis of diversity jurisdiction.[361] Plaintiff thereafter amended her complaint to include negligence claims, as well as violations of Pennsylvania State and Local Municipal Ordinances, the "pertinent provisions" of the Federal Aviation Act, and 14 C.F.R. §§ 25, 121, and 125.[362] Defendant moved to dismiss, arguing that "Plaintiff's claims arising from common law standards, state statutes, and local ordinances should be dismissed because they are preempted by federal law," and that Plaintiff failed to plead sufficient facts to support the claims brought pursuant to federal aviation safety standards.[363]

Relying on the decision of the U.S. Court of Appeals for the Third Circuit in *Abdullah v. American Airlines, Inc.*,[364] the district court found that Plaintiff's common law, state statutory, and lo-

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356 *Id.* (citing *Bennett*, 2006 WL 1987821, at *1).

357 *Id.*

358 *Id.* at 654, 658.

359 No. 07-1266, 2007 WL 2844592 (E.D. Pa. Oct. 1, 2007).

360 *Id.* at *1.

361 *Id.* Plaintiff's complaint raised only state law grounds, and Defendant moved to dismiss on preemption grounds. *Id.* However, Plaintiff was granted leave to amend the complaint to include federal grounds and Defendant's first motion was mooted. *Id.*

362 *Id.*

363 *Id.*

364 181 F.3d 363, 365 (3d Cir. 1999).

cal ordinance standards of care were preempted by the Federal Aviation Act.[365] In *Abdullah*, the Third Circuit held "that [because] federal law establishes the applicable standards of care in the field of air safety, generally, thus preempting the entire field from state and territorial regulation," claims cannot be based on violations of state law standards of care.[366] The district court noted that other courts within the Third Circuit had adopted *Abdullah*'s reasoning and found that state standards of care were preempted in similar cases, and rejected Plaintiff's argument that *Abdullah* was no longer good law in light of the September 11th Victims' Compensation Fund (the "Fund")[367] and the Supreme Court's decision in *Geier v. American Honda Motor Co.*[368]

Plaintiff argued that the Fund was evidence that Congress did not intend to displace state standards with respect to aviation safety, because it explicitly directs that "[t]he substantive law for decision in any such suit shall be derived from the law, including choice of law principles, of the State in which the crash occurred unless such law is inconsistent with or preempted by Federal law."[369] However, the district court was not persuaded by this argument and noted that, in light of the limited applicability of that language, "[p]inning congressional intent to overturn or alter widespread, if not uniform, interpretation of other [Federal Aviation Act] provisions and to clarify a national preemption standard on this narrow statute would be inappropriate."[370]

The district court also rejected Plaintiff's reliance on *Geier*, in which the Supreme Court held that the "savings clause" of the National Traffic and Motor Vehicle Safety Act of 1966 "preserved state law causes of action for violation of automobile standards imposed by the states."[371] Unlike the Federal Aviation Act, the savings clause interpreted by the *Geier* Court expressly preserved state law standards, whereas the provision in the Fed-

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365 *Levy*, 2007 WL 2844592, at *3.

366 *Id.* (citing Allen v. Am. Airlines, Inc., 301 F. Supp. 2d 370, 374 (E.D. Pa. 2003); Margolies-Mezvinski v. U.S. Air Corp., No. 98-1526, 2000 WL 122355 (E.D. Pa. Jan. 28, 2000)).

367 Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001) (codified at 49 U.S.C. § 40101 (2000)); *Levy*, 2007 WL 2844592, at *4.

368 529 U.S. 861 (2000).

369 Air Transportation and Stabilization Act, Pub. L. No. 107-42, § 408(b)(2) (codified at 49 U.S.C. § 40101).

370 *Levy*, 2007 WL 2844592, at *4.

371 *Id.* (citing *Geier*, 529 U.S. at 868).

eral Aviation Act does not and accordingly has been held to preserve state law remedies, rather than state standards.[372] The district court found that "under the [Federal Aviation Act], federal law provides the pertinent standard of care for aviation safety," and therefore dismissed Plaintiff's claims for violation of state and local statutory, as well as common law, standards of care.[373]

However, the district court denied Defendant's motion to dismiss with respect to Plaintiff's claims for violation of federal standards of care under the Federal Aviation Act.[374] Although Defendant argued that Plaintiff had failed to plead sufficient facts to establish the violation of any specific provisions, "[t]he court infer[red] that the . . . 'pertinent provisions' language alleg[d] violations of general standards of operation and maintenance promulgated pursuant to the [Federal Aviation Act]."[375] The district court noted that under *Abdullah,* the general standard of care in an aviation negligence action was not merely that of specific regulations, but also the:

> overall concept that aircraft may not be operated in a careless or reckless manner. . . . [T]he applicable standard of care is not limited to a particular regulation of a specific area; it expands to encompass the issue of whether the overall operation or conduct in question was careless or reckless.[376]

The district court found that, while Plaintiff's complaint was not extensively detailed, the allegation that her injuries resulted from a "broken and/or improperly closed overhead storage compartment" was sufficient to put Defendant on notice of the event at issue and to implicate a federal standard of care derived from the Federal Aviation Act.[377] The district court further found that Plaintiff had alleged sufficient facts to pursue her claims for violation of 14 C.F.R. §§ 121.589 and 125.289, which "relate to carriage of cargo in the passenger [area] and training of crewmembers," because it was possible that her injuries stemmed from failure to adequately secure carry-on luggage or

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372 *Id.* (citing Abdullah v. Am. Airlines, Inc., 181 F.3d 363, 375 (3d Cir. 1999)).

373 *Id.*

374 *Id.* at *5.

375 *Id.*

376 *Id.*; *see also* Aldana v. Air E. Airways, Inc., 477 F. Supp. 2d 489, 493 (D. Conn. 2007) (finding that the Federal Aviation Act preempts common law negligence standards, but not the right to pursue negligence claims).

377 *Levy,* 2007 WL 2844592, at *6.

inadequate crew training.[378] However, the district court dismissed Plaintiff's claims for violation of 14 C.F.R. §§ 25.787 and 25.853, as they related to "type certification" and duties of a manufacturer with respect "to production and design, not operation," and could not be violated by the Defendant.[379] The court thus granted Defendant's motion to dismiss with respect to Plaintiff's claims relating to the alleged violation of common law, state law, local ordinances, and C.F.R. parts relating to a manufacturer's duties, but denied it with respect to the alleged violation of standards of care derived from the Federal Aviation Act and the C.F.R. parts relating to baggage storage and crew training.[380]

3. Air Evac EMS, Inc. v. Robinson

Air Evac EMS, Inc. v. Robinson[381] arose out of Plaintiff air ambulance service's receipt of notice from the Defendant Tennessee Board of Emergency Medical Services ("the Board") that Plaintiff was operating in violation of the Board's rules requiring helicopters licensed in the state to be equipped with certain specific avionics equipment.[382] Plaintiff challenged the rules at a hearing before the Board, arguing that the rules were preempted by federal law and therefore invalid.[383] Two days before the Board issued its final order, which rejected the challenge and found that the rules were valid and not preempted, Plaintiff commenced this action in the U.S. District Court for the Middle District of Tennessee.[384] The parties cross-moved for summary judgment on preemption grounds, and Defendants moved to dismiss the claims, urging the court to abstain from exercising jurisdiction under *Younger v. Harris*.[385]

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[378] *Id.*

[379] *Id.* at *7.

[380] *Id.*

[381] 486 F. Supp. 2d 713 (M.D. Tenn. 2007) (denying Plaintiff's motion to amend its complaint to include a claim that Defendants' "aircraft crew safety and training" regulations were preempted by federal law).

[382] *Id.* at 715 (the United States also filed a Statement of Interest in the case).

[383] *Id.*

[384] *Id.* Plaintiff's complaint sought a declaratory judgment that the Board did not have the power to issue rules regarding aviation safety, and an injunction enjoining the enforcement of any such rules. *Id.* Following the Board's order, Plaintiff amended its complaint to allege that the Board's rules in question were preempted by federal law. *Id.*

[385] 401 U.S. 37 (1971); *Air Evac*, 486 F. Supp. 2d at 715–16.

In addressing the abstention issue, the *Air Evac* court noted that although there is a "virtually unflagging obligation of the federal forum to exercise its jurisdictional powers,"[386] in *Younger v. Harris*, the Supreme Court made clear that in certain limited and extraordinary situations, the concerns of equity, comity, and federalism render it appropriate for a federal court to abstain from exercising its jurisdiction out of deference to parallel state proceedings.[387] As the *Air Evac* court explained:

> The Sixth Circuit has held that abstention pursuant to *Younger* is appropriate only when a court can answer the following three questions in the affirmative: (1) do the relevant state proceedings "constitute an ongoing state judicial proceeding;" (2) do the proceedings "implicate important state interests;" and (3) is there "an adequate opportunity in the state proceedings to raise constitutional challenges."[388]

Although it was undisputed that the state proceedings in question were "judicial" in nature, the district court noted that it was not clear that they were ongoing because the Board already had entered its final order.[389] The district court then found that there was no substantial state interest involved to satisfy the second *Younger* factor.[390] It stated that the relevant state interest in this analysis was not the outcome of the Board's proceedings with respect to this Plaintiff's claims, but rather "whether [Tennessee] has a substantial, legitimate interest in regulating the avionics equipment aboard air ambulances operating, at times, within its borders."[391] There was no evidence or precedent to support the proposition that regulation of avionics equipment is an important state interest, and the *Air Evac* court noted that regulation with respect to Plaintiff's helicopters could affect multiple states' interests because the "helicopters are based in eleven states, including Tennessee" and "[m]any of [Plaintiff's] flights to Tennessee hospitals originate from its bases in Kentucky, Mississippi and Alabama."[392] Any relevant state interest in

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386 *Air Evac*, 486 F. Supp. 2d at 717 (citing United States v. Anderson County, Tenn., 705 F.2d 184, 186 (6th Cir. 1983)).

387 *Id.* at 718.

388 *Id.* (citing Norfolk & W. Ry. Co. v. Pub. Util. Common of Ohio, 926 F.2d 567 (6th Cir. 1994)).

389 *Id.* at 718–19 (noting that it need not resolve the issue of whether or not the proceeding was "ongoing" because it found *Younger* abstention inappropriate on other facts).

390 *Id.* at 719–20.

391 *Id.* at 719.

392 *Id.* at 720.

the proceedings was further weakened because the Board's rules were preempted by federal law.[393] Finally, although the district court found, and Plaintiff did not dispute, that it had an "adequate opportunity at the state level to raise its constitutional challenges" during the Board's proceeding,[394] the district court concluded that this was insufficient to support *Younger* abstention in light of the insignificant state interest involved, and thus exercised its jurisdiction to decide the motion on preemption grounds.[395]

In addressing whether the Board's rules were preempted by federal law, the district court noted that in *Greene v. B.F. Goodrich Avionics*,[396] the U.S. Court of Appeals for the Sixth Circuit had held "that 'federal law establishes the standards of care in the field of aviation safety and thus preempts the field from state regulation.'"[397] Based on this, the *Air Evac* court found that the Board's rules were preempted pursuant to field preemption.[398] In so finding, the district court rejected Defendants' argument that Congress had not preempted the field of "helicopter ambulance safety," noting the extensive number of FAA regulations addressing navigational equipment.[399] Accordingly, the district court denied Defendants' motion to dismiss on abstention grounds and granted Plaintiff's motion for summary judgment on preemption grounds.[400]

C. Federal Aviation Administration Authorization Act of 1994

Congress' intent to deregulate the motor carrier industry is codified in 49 U.S.C. § 14501.[401] The statute was amended and incorporated into the Federal Aviation Administration Authorization Act of 1994 ("FAAAA") to prohibit the enforcement of any state law "related to a price, route, or service of any motor

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393 *Id.*

394 *Id.* at 720–21.

395 *Id.* at 721.

396 409 F.3d 784, 795 (6th Cir. 2005).

397 *Air Evac*, 486 F. Supp. 2d at 722.

398 *Id.*

399 *Id.* at 721, 723–24.

400 *Id.* at 724.

401 H.R. Conf. Rep. No. 103-677, at 82 (1994); *see also* Tocher v. City of Santa Ana, 219 F.3d 1040, 1046 (9th Cir. 2000).

carrier."[402] Congress determined that the FAAAA would have the same preemptive scope as the ADA.[403]

1. Barber Auto Sales, Inc. v. United Parcel Services, Inc.

In *Barber Auto Sales, Inc. v. United Parcel Services, Inc.*,[404] the U.S. District Court for the Northern District of Alabama addressed an action relating to UPS's alleged manipulation of its audit procedures for determining the size and weight of packages resulting in artificially high shipping charges.[405] Under Defendant's shipping system, the shipping charges were based upon the size and weight of the package as entered by the customer.[406] Defendant's Customer Agreement granted Defendant the right to audit customer's shipments in order to verify that the customer paid the appropriate charge and submit an adjusted invoice to the customer if it determined the customer had not paid the appropriate charge.[407] The Customer Agreement allowed customers 180 days following receipt of the invoice to challenge any disputed charge, and further described "compliance with those notice and claims periods as a contractual condition precedent to discovery."[408]

Plaintiff, a domestic shipper, brought both an individual action against Defendant for breach of contract, and a class action on behalf of similarly situated persons for breach of contract, both seeking:

> "(1) monetary damages for breach of contract, (2) an order voiding all contracts 'to the extent that [Defendant] assessed improper increased shipping charge corrections' on packages; and (3) an injunction prohibiting [Defendant] from assessing improper shipping charges and requiring [Defendant] to conform its practices to comply with the terms and conditions and courses of dealing between the parties."[409]

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402 49 U.S.C. § 14501(c)(1) (2000).

403 H.R. Conf. Rep. No. 103-677, at 83.

404 494 F. Supp. 2d. 1290 (N.D. Ala. 2007).

405 *Id.* at 1292.

406 *Id.* at 1291.

407 *Id.*

408 *Id.* at 1291–92.

409 *Id.* at 1292. Defendant also brought a motion for summary judgment on Plaintiff's breach of contract claim. *Id.* This summary does not address the court's findings with respect to Plaintiff's breach of contract claims, but rather is limited to preemption.

Defendant moved for partial summary judgment on the grounds that Plaintiff's request for injunctive relief was preempted by the FAAAA.[410]

In considering Defendant's argument, the district court noted that the preemptive language adopted by Congress in the FAAAA provision was identical to that of the ADA provision, and that courts have therefore relied on cases addressing the preemptive effect of the ADA in deciding FAAAA preemption questions.[411] The district court reasoned that because the Supreme Court has made clear that the ADA preempts state action relating to the "price, route, or service of any air carrier," but not "routine breach of contract claims," the FAAAA had a similarly broad, but not unlimited, scope.[412]

Both parties agreed that Plaintiff's breach of contract claim was not preempted by the FAAAA.[413] The district court concurred, and therefore the only preemption question for decision was whether the equitable claims were preempted.[414] Defendant argued that the claims were preempted because granting the requested injunctive relief would constitute an enlargement of the parties' bargain and exceed the bounds of usual contractual remedies.[415] Plaintiff countered that because the claims arose out of Defendant's contractual obligations, they were not preempted.[416]

The district court found that granting equitable relief would "constitute an . . . enhancement of the parties' bargain" on the basis of a state policy, and therefore the claims were preempted by the FAAAA.[417] Accordingly, the district court granted Defendant's motion for partial summary judgment.[418]

2. *Kuehne v. United Parcel Service, Inc.*

In *Kuehne v. United Parcel Service, Inc.*,[419] the Indiana Court of Appeals addressed an appeal relating to a negligence action brought by Plaintiff homeowner for injuries allegedly sustained

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410 *Id.*

411 *Id.* at 1293.

412 *Id.* (citing Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 222–23 (1995); Morales v. Trans. World Airlines, Inc., 504 U.S. 374, 378 (1992)).

413 *Id.* at 1293.

414 *Id.* at 1294.

415 *Id.*

416 *Id.*

417 *Id.*

418 *Id.*

419 868 N.E.2d 870 (Ind. Ct. App. 2007).

as a result of tripping over a package Defendant left on her doorstep.[420] An Indiana state trial court had granted summary judgment for Defendant, finding that Plaintiff's claims were preempted by the FAAAA as related to Defendant's price, route, or service, and the Interstate Commerce Act.[421]

The Court of Appeals reversed,[422] finding that the purpose of the FAAAA express preemption provision was not to preclude all tort actions arising under state law, and it was unlikely "that Congress was attempting to displace state personal injury tort law concerning incidents that involve the safety of an individual who receives a package at a doorstep."[423] The Court of Appeals noted that other courts had concluded that the FAAAA preempts claims arising out of circumstances that occurred before a package reached its destination, but found that conduct after that point was "categorically distinct" and unrelated to the operation of an aircraft.[424] Furthermore, in looking to the plain language of the preemption provision of the FAAAA, it found that the juxtaposition of "service" to "rates" and "routes" referred to issues such as scheduling.[425] The Court of Appeals noted that if a court were to interpret the FAAAA provision of "service" any broader, it would run the risk of interpreting the FAAAA to preempt all airline activities, which could not be the intended result of the drafters of the FAAAA.[426] Therefore, the Court of Appeals ordered the judgment reversed and remanded.[427]

D. Federal Tort Claims Act

The Federal Torts Claims Act[428] ("FTCA") waives U.S. sovereign immunity for injury to or loss of property, personal injury or death resulting from "the negligent or wrongful act or omission" of any government employee acting in the scope of his

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420 *Id.* at 872.

421 *Id.* at 872–73 (Defendant specifically argued that the Carmack Amendment, 49 U.S.C. § 14706 (2000 & Supp. 2005), "exclusively governs a carrier's liability and shippers' remedies that arise from contracts regarding the interstate shipment of property.").

422 *Id.* at 878.

423 *Id.* at 877.

424 *Id.* at 876–77 (citing Somes v. United Airlines, Inc., 33 F. Supp. 2d 78, 83 (D. Mass. 1999)).

425 *Id.* at 877 (citing *Somes*, 33 F. Supp. 2d at 83).

426 *Id.*

427 *Id.* at 878.

428 28 U.S.C. §§ 1346, 2671 (2000).

employment, under the same circumstances in which a private individual would be held liable.[429] The FTCA has several exemptions, most notably against claims based upon government employees' performance or omission of a "discretionary function or duty" while "exercising due care."[430]

1. Wojciechowicz v. United States

Wojciechowicz v. United States[431] arose out of the crash of a small aircraft in Puerto Rico that resulted in the deaths of the pilot and four related passengers onboard.[432] The estates of the decedent-pilot and a decedent-passenger, his daughter, filed claims for wrongful death with the FAA, and subsequently brought suit against the Government in the U.S. District Court for the District of Puerto Rico seeking damages for wrongful death pursuant to the FTCA.[433] The Government moved to dismiss the claims of certain Plaintiffs, specifically the unnamed adult family members of each estate, arguing that the district court had no jurisdiction over their claims under the FTCA because they were not specifically identified in the administrative claims and, therefore, those Plaintiffs could not pursue judicial relief.[434]

The United States Government, "as a sovereign, is immune from suit unless it waives its immunity by consenting to be sued."[435] The FTCA provides a limited waiver of this immunity, under which the Government may be liable for damages "in the same manner and to the same extent as a private individual under like circumstances."[436] This waiver of immunity is subject to "a requirement that those seeking relief present their claim to the pertinent federal dependency prior to seeking judicial relief."[437] This claim must be made in writing and filed within two years of accrual, in order to allow the Government a reasonable opportunity to investigate the claims and its potential liability.[438] As explained by the district court, claimants must pursue, or exhaust, every available administrative remedy before filing suit

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429 28 U.S.C. § 1346(b).

430 28 U.S.C. § 2680(a) (2000).

431 474 F. Supp. 2d 283 (D.P.R. 2007).

432 *Id.* at 285.

433 *Id.* at 285–86.

434 *Id.* at 288. The Government did not challenge the claims asserted by the executors individually, and there was no discussion of any minor children. *Id.*

435 *Id.* at 286 (citations omitted).

436 *Id.* at 287 (citations omitted).

437 *Id.*

438 28 U.S.C. § 2401(b) (2000); *Wojciechowicz*, 474 F. Supp. 2d at 287.

pursuant to the FTCA to facilitate fair settlements and "avoid litigation where a claim can be resolved administratively."[439]

The First Circuit has stated that it does not strictly interpret or apply the notice requirement, but has "attempted instead to achieve a balance, recognizing that persons wishing to hold the federal sovereign [state] liable in tort must satisfy the strictures of the law, but also recognizing that Congress did not intend to shield the federal fisc behind an impenetrable thicket of lawyerly technicalities."[440] The language of an administrative claim must be sufficient to put the agency on due notice of: (1) the conduct to be investigated; and (2) the amount of damages sought, which "requires enough information regarding the identity of the persons seeking relief, the underlying grounds therefore and the sums demanded, to allow for a meaningful investigation of the facts and an assessment of potential liability."[441] The agency must have notice of who the individual claimants are, and the allegations within the administrative claim must "jibe" with the allegations in any subsequent complaint.[442]

The Government argued that because the administrative complaints at issue were filed by the estates' executors on behalf of themselves individually and as representative for the estates, but did not name all Plaintiffs in this action individually, it did not have notice of those individual claims.[443] The Government further argued that the standing of the representatives of the estates was not at issue; rather, the issue was whether the district court had subject matter jurisdiction over those Plaintiffs' claims under the FTCA because they had not complied with the notice requirement.[444]

The district court rejected the Government's argument, finding the issues of standing and notice to be "inextricably intertwined," and stated that:

> Notice cannot be examined in a vacuum. It is necessarily connected to the law which gives rise to the cause of action being asserted. The scope of the representation capacity of a plaintiff as well as the nature of the damages which may be collected thereby and on whose behalf will be determined by the state's

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439 *Wojciechowicz*, 474 F. Supp. 2d at 287.

440 Dynamic Image Tech., Inc. v. United States, 221 F.3d 34, 40 (1st Cir. 2000).

441 *Wojciechowicz*, 474 F. Supp. 2d at 288.

442 *Id.* (citing *Dynamic Image Tech.*, 221 F.3d at 41).

443 *Id.* at 288–89.

444 *Id.*

applicable law. Hence, the adequacy of the notice may vary depending on which law is used to examine the scope of the representation, i.e., standing.[445]

After noting that the Government's liability for tort claims under the FTCA "is determined in accordance with the law of the place where the act or omission occurred,"[446] the district court found that the applicable substantive law in this case was that of Puerto Rico.[447] Under Puerto Rico law, "an estate is not a juridical person and as such does not have the legal capacity to prosecute a wrongful death claim."[448] Therefore, as the district court noted, to comply with the FTCA's notice requirement, each claimant must file a claim in his or her individual capacity because damages for wrongful death do not inure to the benefit of the estate.[449]

In light of this, under Puerto Rico law, the fact that two administrative claims were submitted by the executors of the respective estates both individually and as representatives of each of the estates "does not necessar[ily] translate into notice of the individual claims of the members of the two estates."[450] The district court found that even if the claims filed with the FAA were inadequate, "[t]he claims for the two estates were filed the same day through the same counsel, all bore the same last name and the FAA denied all the claims via a single letter" and, therefore, the agency had sufficient additional evidence indicating the identities of the members of each estate.[451] Further, the district court noted that because the Government also had the means to further investigate the identities of the individual claimants by requiring them to submit the full names of decedents' survivors,[452] the FTCA's jurisdictional notice requirement was satisfied.[453] Thus, the district court denied the Government's motion to dismiss.[454]

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445 *Id.* at 289.

446 *Id.* at 288 (quoting Scanlon v. Dep't of the Army, 277 F.3d 598, 600 (1st Cir. 2002)).

447 *Id.* at 288–89.

448 *Id.* at 289.

449 *Id.* at 290.

450 *Id.*

451 *Id.*

452 *Id.* (citing 28 C.F.R. § 14.4(a)(3) (2008)).

453 *Id.* at 290–91.

454 *Id.* at 291.

2. Torjagbo v. United States

The decision of the U.S. District Court for the Middle District of Florida in *Torjagbo v. United States*[455] addressed an action brought by Plaintiff, a flight instructor at Patrick Air Force Base ("PAFB"), for injuries allegedly sustained during an emergency landing after the aircraft he was piloting during a training flight lost partial engine power.[456] Plaintiff also claimed that PAFB's air traffic controller had negligently handled his request for assistance because air traffic control had initially provided Plaintiff with the wrong radio frequency to request directions to the nearest airport.[457] Plaintiff had filed an administrative claim with the PAFB claims office, alleging that his injuries resulted from the negligence of PAFB personnel in the repair, maintenance, and inspection of the aircraft.[458] The administrative claim was denied, as was his request for reconsideration, after investigation yielded no evidence of negligence.[459] Plaintiff, construing the letter he received denying his request as an invitation to submit further evidence, replied and raised an administrative claim alleging negligence on behalf of PAFB's air traffic controller in responding to his request for assistance.[460] Plaintiff was informed that his administrative claims had been rejected and were no longer in consideration, and any response to his latest allegation would be inappropriate.[461]

Prior to receiving the denial of his request for reconsideration, Plaintiff filed the instant action in the district court seeking to recover damages from the Government pursuant to the FTCA for negligent maintenance of the aircraft and negligent response to his emergency.[462] Defendant moved to dismiss his allegations of air traffic controller negligence on the ground that

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455 No. 6:05-cv-419-Orl-28KRS, 2007 WL 1970867 (M.D. Fla. July 3, 2007).

456 *Id.* at *1.

457 *Id.* The PAFB controller had initially advised Plaintiff of the radio frequency of Daytona Approach Control, instead of the Miami Center. *Id.* Although the PAFB controller attempted to provide the Miami Center frequency fifty-five seconds later, there was no evidence Plaintiff received the transmission, and by the time Daytona advised Plaintiff of the Miami frequency, Plaintiff was already committed to the emergency landing. *Id.* The controller "initially advised Plaintiff of the radio frequency for Daytona Approach Control for directions to the nearest airport, but fifty-five seconds later the controller corrected the transmission and attempted to provide the frequency." *Id.*

458 *Id.*

459 *Id.* at *1–*2.

460 *Id.* at *2.

461 *Id.*

462 *Id.*

the district court did not have subject matter jurisdiction over the action under the FTCA.[463]

The district court began by noting that, "[u]nder the FTCA, subject matter jurisdiction is conferred upon a district court only after a plaintiff has first made a claim to the appropriate federal agency and received a final denial of that claim," and discussing the policies behind requiring that a plaintiff exhaust all available administrative remedies, as well as the need to provide the government with sufficient notice of the claims involved.[464]

Plaintiff argued that his letter in response to the denial of his request for reconsideration constituted an amendment of his original administrative claim, but the district court rejected the argument.[465] Because the letter was not sent until after Plaintiff's administrative claim had been investigated and reconsidered, the district court found that the jurisdictional notice requirement was not satisfied because "[n]othing in his administrative complaint could have suggested to Defendant that Plaintiff also linked his injuries to the actions of PAFB's air traffic controllers."[466] In addition, the administrative claim relating to the air traffic controllers' negligence was not raised until over three years after the accident and was time-barred under the FTCA.[467] Therefore, the district court granted Defendant's motion to dismiss the air traffic controller claims.[468]

3. Garland v. U.S. Airways, Inc.

Garland v. U.S. Airways, Inc.[469] arose out of an allegedly wrongful termination claim brought by a former U.S. Airways pilot who claimed he was fired because he no longer had a valid pi-

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[463] *Id.* Defendant also moved for summary judgment on the maintenance claims on evidentiary grounds. *Id.*

[464] *Id.*

[465] *Id.* at *4.

[466] *Id.*

[467] *Id.*

[468] *Id.* The district court also granted Defendant's motion for summary judgment on the negligent maintenance claims, finding that Plaintiff had executed a valid and enforceable "Covenant Not to Sue and Indemnity Agreement" in connection with his role as an instructor in the PAFB's "Aero Club." *Id.* at *6–*8. Although Plaintiff alleged during his deposition that he did not recall ever signing the agreement, the district court found that "overwhelming evidence supports the conclusion that Plaintiff did execute the Covenant Not to Sue," and that there was not a genuine issue of material fact to preclude summary judgment. *Id.* at *6.

[469] No. 05-140, 2007 WL 320832 (W.D. Pa. Jan. 30, 2007).

lot's license.[470] Plaintiff, a *pro se* litigant, asserted an action against U.S. Airways and employees of the FAA for depriving him of his license.[471] The Federal Defendants moved to dismiss, arguing that the U.S. District Court for the Western District of Pennsylvania did not have jurisdiction over the case under the FTCA because Plaintiff "failed to present a proper administrative claim as required under the FTCA."[472]

The court granted the Federal Defendant's motion, finding that the FTCA's provision requiring "that a claimant 'present' an administrative claim to the appropriate federal agency prior to commencing suit against the United States in federal court" was a necessary condition precedent that could not be waived.[473] Because there was no evidence that Plaintiff had ever filed an administrative claim with the FAA prior to commencing suit, the district court did not have jurisdiction over the action and Plaintiff's claims were dismissed.[474]

E. Railway Labor Act

The Railway Labor Act[475] ("RLA") was passed in 1926 to govern all railway labor disputes and was amended in 1936 to apply to disputes in the airline industry as well.[476] The purpose of the RLA is "to promote stability in labor-management relations by providing a comprehensive framework for resolving labor disputes."[477] Primarily, the RLA imposes requirements for prompt arbitration, encouraging the settlement of labor disputes to prevent workforce strikes or other labor interruptions in the railway and airline industries.[478] Courts have interpreted the RLA as classifying disputes as "major" or "minor."[479] Major disputes involve disputes relating to contractual rights or collective bargaining agreements ("CBA") concerning "rates of pay, rules, or

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[470] *Id.* at *1.

[471] *Id.* At the time Plaintiff filed his second amended complaint against twenty-four defendants, two defendants, Rich Davies and Harold Simpson ("Federal Defendants"), were employees of the FAA. *Id.* Plaintiff claimed the Federal Defendants conspired with others to deprive him of his Airline Transport Pilot Certification, ultimately leading to his termination. *Id.*

[472] *Id.* at *3.

[473] *Id.*

[474] *Id.*

[475] 45 U.S.C. § 151 (2000).

[476] *See* 45 U.S.C. §§ 151, 151(a), 181.

[477] Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 252 (1994) (citing Atchison, Topeka & Santa Fe Ry. Co. v. Buell, 480 U.S. 557, 562 (1987)).

[478] *See id.* at 252–53; *see also* 45 U.S.C. § 151(a).

[479] *See Hawaiian Airlines*, 512 U.S. at 252–53.

working conditions."[480] Minor disputes concern the interpretation, application, or enforcement of the contractual rights or labor agreements.[481] The Supreme Court has held that the RLA does not preempt state law claims involving "rights and obligations that exist independent" of any labor agreements.[482]

1. *Gilmore v. Northwest Airlines, Inc.*

In *Gilmore v. Northwest Airlines, Inc.*,[483] Plaintiff, who suffered from "major recurrent depression," was employed by Defendant as a customer service agent under terms governed by a CBA.[484] Plaintiff's depression had caused her to miss work on several occasions.[485] On one occasion, Plaintiff submitted a Family Medical Leave Act ("FMLA") certification from her doctor stating that she would be absent from work for two weeks due to her depression.[486] However, Plaintiff was unable to return to work at the end of the two-week period.[487] Thereafter, Plaintiff submitted another FMLA certification from her doctor with amended dates to cover her extended expected absence.[488] The time period covered by the second FMLA certification elapsed and Plaintiff still was unable to work.[489] Thereafter, Plaintiff's supervisor "advised [Plaintiff] that she could fill out new FMLA paperwork when she returned to work."[490] Plaintiff eventually returned to work after nearly two months, at which time "she was fired for poor attendance, including her failure to report to work during her FMLA-leave period."[491]

After pursuing a grievance under the CBA, Plaintiff filed suit against Defendant claiming negligent infliction of emotional distress and violations of the FMLA and the Minnesota Human Rights Act.[492] Defendant moved for judgment on the pleadings

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480 *Id.*; 45 U.S.C. § 151(a)(4).

481 *See* 45 U.S.C. § 151(a)(5); *Hawaiian Airlines*, 512 U.S. at 252–53, 256-57.

482 *Hawaiian Airlines*, 512 U.S. at 260.

483 504 F. Supp. 2d 649 (D. Minn. 2007).

484 *Id.* at 652.

485 *Id.*

486 *See id.*

487 *Id.*

488 *Id.*

489 *Id.*

490 *Id.*

491 *Id.*

492 *Id.* at 652–53.

for lack of subject matter jurisdiction on the grounds that Plaintiff's action was preempted by the Railway Labor Act.[493]

In addressing Defendant's motion, the U.S. District Court for the District of Minnesota noted that Northwest's "activities" as an airline were regulated by the Railway Labor Act.[494] The district court then commented on the "contours" of the Railway Labor Act, which established a "mandatory arbitral regime for all 'minor' disputes."[495] "Minor" disputes are controversies that arise out of "the application or interpretation of [a] collective bargaining agreement."[496] "Major" disputes, however, "relate to the formation of collective [bargaining] agreements or efforts to secure them" (*e.g.*, "rates of pay, rules or working conditions").[497] The Act preempts federal subject matter jurisdiction if a dispute is found to be minor.[498] The district court noted that the line between minor and major disputes is a "fine one,"[499] but that disputes were presumed to be minor in the Eighth Circuit.[500]

In its motion, Defendant argued that because Plaintiff's claims could not be addressed without reference to the CBA, they were minor disputes preempted by the Railway Labor Act.[501] The CBA set forth all Northwest "rules, regulations and orders" relating to the employee attendance policy.[502] It provided that

> an absence from work is either "accountable" or "excusable," depending on the reason for the absence. While absences that qualify for FMLA leave are "excusable," the attendance policy requires an employee *unexpectedly* absent who believes that her absence qualifies as "excusable" to notify her manager within either two business days or four calendar days (whichever is longer) from the date she became aware of the need for leave.[503]

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493 *Id.* at 653 (citing Railway Labor Act, 45 U.S.C. § 151 (2000)).

494 *Id.* (quoting Carpenter v. Nw. Airlines, Inc., No. CIV 00-2490ADM/AJB, 2001 WL 1631445, at *1 (D. Minn. June 7, 2001)).

495 *Id.* (citing 45 U.S.C. § 184 (2000); Pittari v. Am. Eagle Airlines, 468 F.3d 1056, 1060 (8th Cir. 2006)).

496 *Id.* at 654 (quoting *Pittari*, 468 F.3d at 1060).

497 *Id.* (quoting Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 252 (1994)).

498 *Id.* at 653 (citing *Pittari*, 468 F.3d at 1060).

499 *Id.* at 654 (citing Bhd. of Maint. of Way Employees v. Burlington N. Santa Fe R.R., 270 F.3d 637, 639 (8th Cir. 2001)).

500 *Id.* (citing Bloemer v. Nw. Airlines, Inc., 401 F.3d 935, 939 (8th Cir. 2005)).

501 *Id.* (citing Schiltz v. Burlington N.R.R., 115 F.3d 1407, 1414 (8th Cir. 1997)).

502 *Id.* at 652.

503 *Id.*

Defendant argued that Plaintiff had not provided appropriate notice to it under the CBA when she took "unforeseen FMLA leave" and, in order to decide whether her notice and, correspondingly, her termination was proper, the district court had to interpret the terms of the CBA.[504] Plaintiff countered that her termination was improper based on the FMLA even if "it was 'arguably justified' under the CBA due to insufficient notice."[505] As the district court observed, Plaintiff claimed that the FMLA imposed "greater restrictions on [Defendant's] ability to terminate her employment" than the CBA.[506]

In addressing Defendant's motion, the district court noted that it was not aware of a single case that had found that the Railway Labor Act preempted an FMLA claim.[507] It observed that this likely was because FMLA rights arise under federal law and not by contract.[508] In light of this, when a unionized employee seeks to enforce FMLA rights, the claim generally can be resolved without reference to a CBA and, as a result, it is not a "minor" dispute and is not preempted.[509] The district court found that Plaintiff's right to be absent from work at Northwest due to a qualifying "serious health condition," without reprisal, was a right that existed independent of the CBA and her claim was not preempted.[510] In so finding, the district court indicated that "not every dispute concerning employment, or tangentially involving a provision of a [CBA], is preempted."[511] Further, Plaintiff's filing of a grievance under the CBA before commencing her federal action did not transform the dispute from "major" to "minor."[512] Accordingly, the district court denied Defendant's motion for judgment on the pleadings.[513]

2. *Fitz-Gerald v. SkyWest Airlines, Inc.*

In *Fitz-Gerald v. SkyWest Airlines, Inc.*,[514] the California Court of Appeal addressed whether flight attendants' claims of alleged airline violations of California labor law relating to minimum

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504 *Id.* at 656.
505 *Id.*
506 *Id.*
507 *Id.* at 654.
508 *Id.*
509 *Id.* (citing Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 256 (1994)).
510 *Id.* at 656.
511 *Id.* at 657 (quoting *Hawaiian Airlines*, 512 U.S. at 260).
512 *Id.*
513 *Id.* at 658.
514 65 Cal. Rptr. 3d 913 (Ct. App. 2007).

wage, overtime, and meal and rest breaks were preempted by, *inter alia*, the Railway Labor Act ("RLA")[515] where flight attendant compensation was based on a CBA.[516] Plaintiffs-Appellants, individually and on behalf of former and current flight attendants working for Defendant SkyWest Airlines, Inc. in California, had filed a complaint alleging that SkyWest had not provided "uninterrupted rest periods or meal breaks[,] . . . overtime or state minimum wage for block time."[517] Plaintiffs sought damages for unpaid minimum wages, unpaid meal and rest breaks, overtime, waiting time penalties and "relief under the Unfair Business Practices Act."[518] Defendant moved for summary judgment, which the court granted, finding that the action was, *inter alia*, preempted by the RLA.[519] Plaintiffs appealed.[520]

The Court of Appeal stated that the SkyWest In-Flight Association (the "Association"), the flight attendants' employee association, and Defendant had negotiated a SkyWest Airlines Crewmember Policy Manual, which had "all the attributes of a collective bargaining agreement."[521] The Association was the "exclusive bargaining representative" for Defendant's flight attendants, which had 1,100 members, and had "negotiated compensation and workplace rules for the past [ten] years."[522] The Association had bargained for a new compensation agreement "[a]bout every two years."[523] Once negotiated, Association members voted on the agreement and, if approved, it became part of Defendant's Crewmember Policy Manual.[524]

Pursuant to the CBA, Plaintiffs received flight pay, also referred to as "block to block time" starting at the time the aircraft blocks are removed at takeoff and ending with arrival at the destination.[525] Plaintiffs also received a $1.60 per-hour per diem wage for "block time" while the aircraft was readied for flight, while passengers boarded and disembarked, and for flight standbys and layovers.[526] The ratio of block time to flight time

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515 45 U.S.C. § 151 (2000).

516 *See Fitz-Gerald*, 65 Cal. Rptr. 3d at 914–15.

517 *Id.* at 915.

518 *Id.* (citing, *inter alia*, CAL. BUS. & PROF. CODE § 17200 *et seq.* (2008)).

519 *See id.* at 914–15.

520 *Id.*

521 *Id.* at 915.

522 *Id.*

523 *Id.*

524 *Id.*

525 *Id.*

526 *Id.*

was typically two to one on a work day.[527] This method of compensation was "standard in the airline industry."[528]

The flight attendant compensation system under the CBA implicated an order[529] by the California Industrial Welfare Commission ("IWC"), a state agency granted the power to "formulate regulations (known as wage orders) governing employment."[530] The Order required that "certain persons employed in the transportation industry be paid not less than the minimum wage and receive meal/rest breaks and overtime."[531] The Order further required payment of the minimum wage "for all hours [ordered] in the payroll period, whether the remuneration is measured by time, piece, commission, or otherwise."[532]

With respect to their claim for unpaid minimum wages, Plaintiffs argued that the hourly $1.60 per diem wage paid by Defendant violated the applicable minimum wage regulation.[533] Defendant countered that the flight attendant compensation averages were $23.13 per hour, an amount significantly higher than the state minimum wage, based upon flight time and block time averaged over a one-month period.[534] Plaintiffs contended, however, that "wage averaging does not trump state minimum wage law."[535]

Plaintiffs relied on *Armenta v. Osmose, Inc.*,[536] which held that California's labor law reflected a "strong public policy in favor of full payment of wages for all hours worked," in support of their argument.[537] The *Fitz-Gerald* court distinguished *Armenta* on several grounds: it involved a company that serviced utility poles

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527 *Id.*

528 *Id.* Specifically, the court noted that pursuant to the CBA, flight attendants "bid each month for their work schedules and receive flight pay, per diem block pay, vacation and holiday pay, and compensation for flight cancellations and overnight stayovers. . . . SkyWest FAs are guaranteed 3.75 hours flight pay each work day. The CBA provides that FAs may not eat meals during critical phases of flight and that FAA regulations prohibit FAs from working more than 14 hours at a stretch." *Id.* "Per diem block time includes standby time and layovers." *Id.* at 915 n.1.

529 IWC Order No. 9-2001 (2001).

530 *Fitz-Gerald*, 65 Cal. Rptr. 3d at 916.

531 *Id.* at 915 (citing IWC Order No. 9-2001).

532 *Id.* at 916 (quoting IWC Order No. 9-2001 § 4(B)).

533 *Id.*

534 *Id.*

535 *Id.*

536 37 Cal. Rptr. 3d 460 (Ct. App. 2005).

537 *Fitz-Gerald*, 65 Cal. Rptr. 3d at 916–17 (citing *Armenta*, 37 Cal. Rptr. 3d at 468).

rather than an interstate air carrier; "it [did] not involve the RLA or a CBA sanctioned under the RLA, and it did not involve a state wage order that contained an RLA exemption."[538] Further, California labor law provided that "all hours must be paid at the statutory or *agreed rate.*"[539] In *Armenta,* the employer had violated its own CBA and written employment policies by not paying its employees for "time spent driving company vehicles to and from job sites."[540] In *Fitz-Gerald,* however, there was no evidence that Defendant paid its flight attendants "less than what was collectively bargained for."[541]

In turning to Plaintiffs' claim for overtime wages, the Court of Appeal examined the RLA.[542] It noted that the Act "regulates labor relations between common interstate air carriers and their employees,"[543] and set forth the "heart" of the Act,[544] stating:

> It requires that carriers "exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or the operation of any carrier growing out of any dispute between the carrier and the employees thereof."[545]

The *Fitz-Gerald* court stated that in *United Airlines, Inc. v. Industrial Welfare Commission,*[546] the Court of Appeal had ruled that an IWC Order requiring employers to pay for flight attendant uniforms was inapplicable to an interstate airline because it was preempted by the RLA.[547] The *Industrial Welfare* court illustrated the potential interference of the regulation on interstate commerce and the need for a uniform rule throughout the carrier's system by noting the possibility of two flight attendants "working side by side, one with a free uniform, the other with a

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538 *Id.* at 916.

539 *Id.* at 917 (quoting *Armenta,* 37 Cal. Rptr. 3d at 467).

540 *Id.* at 916 (citing *Armenta,* 37 Cal. Rptr. 3d at 467).

541 *Id.* at 917.

542 *Id.*

543 *Id.* (citing 45 U.S.C. § 181 (2000); DeTomaso v. Pan Am. World Airways, Inc., 733 P.2d 614, 618 (Cal. 1987)).

544 *Id.* (citing Bhd. of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 377–78 (1969)).

545 *Id.* (quoting 45 U.S.C. § 152 (2000)).

546 28 Cal. Rptr. 238 (Ct. App. 1963).

547 *Fitz-Gerald,* 65 Cal. Rptr. 3d at 917–18 (citing *Indus. Welfare,* 28 Cal. Rptr. at 248).

uniform a part only of the cost of which United paid" as a result of where they were based (*i.e.*, one in California and one not).[548]

Moreover, the IWC Order at issue in *Fitz-Gerald* itself contained an RLA exemption, providing that overtime wages did not have to be paid to "employees who have entered into a [CBA] under and in accordance with" the Act.[549] The Court of Appeal rejected Plaintiffs' argument that there was no CBA because Defendant was a non-union employer.[550] It noted that under the RLA, airline employees have the right to organize and bargain collectively through their chosen representatives and such representatives include, *inter alia*, any "person or persons" designated by a carrier or by its employees, to act on its behalf.[551] The Court of Appeal noted that California law was consistent with the RLA and that Plaintiffs had failed to cite any authority that the RLA exemption for overtime wages in the IWC Order did not apply to the subject CBA.[552]

With respect to Plaintiffs' minimum wage and meal and rest break claims, the Court of Appeal noted that California courts had "interpreted the RLA to preempt state law causes of action that depend upon interpretation of a CBA."[553] It further noted that the California Supreme Court had held that RLA preemption extended to "any claim premised on facts inextricably intertwined with matters subject to the grievance procedures of the [CBA]."[554] The Court of Appeal rejected Plaintiffs' argument that "the statutory right to meal breaks and rest periods is 'nonnegotiable' and may not be subject to a [CBA] opt-out provision."[555] It noted that the CBA provided for a "bundle of benefits" (*e.g.*, "flight pay, block time, overtime, flight standbys and layovers, vacation, and meal/rest breaks") and that rest periods and meal breaks were referenced in the CBA, which incorporated FAA regulations that flight attendants were prohibited from eating meals "during critical phases of flight."[556] The Court of Appeal continued that, assuming arguendo, a court

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548 *Id.* at 918 (quoting *Indus. Welfare*, 28 Cal. Rptr. at 248).

549 *Id.* (quoting IWC Order No. 9-2001 § 1(E) (2001)).

550 *Id.*

551 *Id.* (citing 42 U.S.C. §§ 151, 152 (2000)).

552 *Id.* at 918–19.

553 *Id.* at 919 (citing Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 253–54 (1994); Soldinger v. Nw. Airlines, Inc., 58 Cal. Rptr. 2d 747, 755 (Ct. App. 1996)).

554 *Id.* (quoting DeTomaso v. Pan Am. World Airways, Inc., 733 P.2d 614, 621 (Cal. 1987)).

555 *Id.* at 920.

556 *Id.*

found violations relating to meal and rest breaks, it would have to determine whether a flight attendant was receiving flight pay or block time pay when the violations occurred, which could not be determined without interpreting the CBA.[557]

The Court of Appeal concluded that Plaintiffs' state minimum wage, meal, and break time claims were preempted by the RLA.[558] Further, the subject IWC Order exempted Defendant from having to pay overtime wages because the claim for overtime wages was subject to a CBA "under and in accordance with the [RLA]."[559] The Court of Appeal found that Plaintiffs' causes of action for waiting time penalties and violation of the California Unfair Business Practices Act also were barred.[560] Accordingly, the judgment was affirmed.[561]

III. THE WARSAW AND MONTREAL CONVENTIONS

On November 4, 2003, the Montreal Convention[562] came into force as to its ratifying signatories,[563] unifying and replacing the Warsaw Convention[564] liability system for claims arising from "international carriage" by air.[565] Specifically, the Montreal Con-

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557 *Id.*

558 *Id.*

559 *See id.* at 918 (quoting IWC Order No. 9-2001 § 1(E) (2001)).

560 *Id.* at 920–21. With respect to the trial court's "alternative" ruling that the complaint was barred by the ADA, the Court of Appeal found only the cause of action for violation of the Unfair Business Practices Act barred under the Airline Deregulation Act of 1978. *Id.* at 921. It stated that Defendant cited "no authority" supporting ADA preemption relating to the enforcement of minimum wage laws or state laws governing meal and rest breaks. *Id.*

561 *Id.* at 922.

562 *See* Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, S. Treaty Doc. No. 106-45, 1999 WL 33292734 [hereinafter Montreal Convention].

563 The Montreal Convention was created and signed by representatives of fifty-two countries at an international conference convened by the International Civil Aviation Organization ("ICAO") in Montreal on May 28, 1999; however, under the terms contained in Article 53(6) of the Convention, it was not to "enter into force" until the "sixtieth day following the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession." *Id.* art. 53(6). Hence, the Montreal Convention entered into force following its ratification by the United States on Nov. 4, 2003. *See* UNITED STATES DEP'T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INT'L AGREEMENTS OF THE UNITED STATES IN FORCE ON JAN. 1, 2006, http://www.state.gov/documents/organization/65515.pdf [hereinafter AGREEMENTS].

564 The Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11 (1934) [hereinafter Warsaw Convention].

565 Montreal Convention, *supra* note 562, art. 55(1)(a).

vention sets forth a liability system for the delay or loss of, or damage to, baggage or cargo, as well as the delay or death of, or bodily injury to, ticketed passengers arising from international carriage by air.[566] However, because all "High Contracting Parties"[567] to the Warsaw Convention have not yet ratified the Montreal Convention, claims arising from "international carriage" by air may still be subject to the Warsaw Convention liability system.[568] Accordingly, this Article addresses both the Montreal and Warsaw Convention liability systems.

A. Preemption Under the Montreal and Warsaw Conventions

1. Knowlton v. American Airlines, Inc.

The decision of the U.S. District Court for the District of Maryland in *Knowlton v. American Airlines, Inc.*[569] addressed Plaintiff's motion to remand to the state court a claim removed by Defendant.[570] Plaintiff's claim was based on Defendant's electronic confirmation of her travel itinerary, which included the notation "breakfast."[571] During the subject flight, Defendant's employees informed Plaintiff that Defendant no longer provided free breakfast and that Plaintiff could purchase breakfast for $3.00.[572]

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566 *Id.* art. 1(1). International carriage by air is defined by Article 1(2) of the Montreal Convention to mean "any carriage in which, according to the agreement between the parties [*i.e.*, the passenger ticket], the place of departure and the place of destination" are situated either: a) within the territories of two States that are parties to the Montreal Convention; or b) within the territory of a single State party to the Montreal Convention if there is an agreed stopping place within the territory of another State, even if that State is not such a party. *Id.* art. 1(2).

567 The Warsaw Convention refers to parties to the Convention as "High Contracting Parties."

568 Montreal Convention, *supra* note 562, art. 55(1)(a). Liability under the Warsaw Convention, as defined by Article 1, applies to claims arising from "international transportation of persons, baggage, or goods performed by aircraft for hire" where, "according to the contract made by the parties, the place of departure and the place of destination . . . are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention." Warsaw Convention, *supra* note 564, art. 1.

569 No. RDB-06-854, 2007 WL 273794 (D. Md. Jan. 31, 2007).

570 *Id.* at *1.

571 *Id.*

572 *Id.*

The district court began its discussion by noting that the purpose of the Montreal Convention, like the Warsaw Convention, was to "promote uniformity in the laws governing airliner liability for the 'international carriage of persons, baggage or cargo performed by aircraft.'"[573] However, the district court noted that the Montreal Convention is "unique" because, as was previously found by the U.S. District Court for the Southern District of New York, while the Montreal Convention still shields airlines from unlimited liability, it also "shows increased concern for the rights of passengers and shippers."[574] Under the Montreal Convention, carriers are subject to three categories of strict liability:

> Article 17 provides for carrier liability in the event of accidental death or bodily injury of a passenger while on board, embarking, or disembarking the plane. Article 17 also includes liability for damage to or loss of baggage. Article 18 of the Montreal Convention addresses liability for damage to cargo, and Article 19 imposes liability for damages resulting from delay of passengers, baggage, or cargo.[575]

Article 29 expressly provides that these categories are intended as the exclusive grounds of carrier liability for damages arising out of international air travel or transport.[576]

Defendant argued that the district court properly had removal jurisdiction because Plaintiff's claims necessarily arose under an international treaty, thus supporting federal question jurisdiction.[577] Plaintiff moved to remand, arguing that her claim did not arise under a treaty of the United States.[578] The

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[573] *Id.* at *2 (citing Montreal Convention, *supra* note 562, art. 1).

[574] *Id.* (citing Weiss v. El Al Isr. Airlines, Ltd., 433 F. Supp 2d 361, 364–65 (S.D.N.Y. 2006)).

[575] *Id.* (citations omitted).

[576] *Id.*

[577] *Id.* at *3. It was unclear from the facts alleged in the complaint whether the Warsaw or Montreal Convention would be controlling because Plaintiff failed to include whether she was traveling on a one-way or round-trip ticket between the United States and the Dominican Republic. *Id.* at *1 n.1. The United States is a party to both the Warsaw Convention and the more recent, and superseding, Montreal Convention. AGREEMENTS, *supra* note 563, at 377, 384–85. Because the Dominican Republic is a party to the Warsaw Convention, but not the Montreal Convention, "a one-way trip from the United States to the Dominican Republic would only be governed by the Warsaw Convention while a round-trip ticket would be governed by the superseding Montreal Convention." *Knowlton*, 2007 WL 273794, at *1 n.1. Defendant moved for removal on the grounds that the claims would be preempted in either situation, but the district court thereafter found sufficient facts to decide that Plaintiff's itinerary fell within the scope of the Montreal Convention. *Id.*

[578] *Id.* at *3.

district court found that Plaintiff's complaint did not satisfy the well-pleaded complaint rule, because it did not mention the Montreal Convention, nor did it appear from the face of the complaint that the Convention "create[d]" her state law cause of action.[579] The district court also noted that Plaintiff's right to relief "does not 'necessarily depend[ ] on resolution of a substantial question of federal law.'"[580] However, the district court noted that "the doctrine of complete preemption provides an alternative means of satisfying the well-pleaded complaint rule," and therefore the precise question for decision was whether the Montreal Convention completely preempted Plaintiff's state law breach of contract claim by providing the exclusive means of recovery.[581]

Turning to its preemption analysis, the district court noted that while "[o]rdinarily, federal preemption serves as a defense to state law claims," the Supreme Court has held that when the claim "does not 'arise under' federal law, a federal preemption defense cannot serve as the basis of federal question jurisdiction."[582] However, if a claim is "completely preempted," because "Congress 'so completely pre-empts a particular area that any civil complaint raising the select group of claims is necessarily federal in character,'" it is deemed to constitute a federal claim appearing on the face of the complaint.[583] Courts are reluctant to find complete preemption, "the [Supreme] Court has articulated exacting standards that must be met before it will find complete pre-emption,"[584] and has only found three statutes that satisfy these standards.[585]

The district court noted that there was a dearth of persuasive authority interpreting the Montreal Convention, as it had only entered into force four years earlier.[586] However, the U.S. District Court for the Southern District of New York had previously

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579 *Id.*

580 *Id.* (quoting Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 27–28 (1983)).

581 *Id.*

582 *Id.* (quoting Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987)).

583 *Id.* (quoting Pinney v. Nokia, Inc., 402 F.3d 430, 449 (4th Cir. 2005)).

584 *Id.* at *4 (quoting Lontz v. Tharp, 413 F.3d 435, 441 (4th Cir. 2005)).

585 *Id.* (citing Dunlap v. G & L Holding Group, Inc., 381 F.3d 1285, 1291 (11th Cir. 2004) (noting that the Supreme Court has only found the following statutes to "completely preempt related state-law claims: (1) § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, (2) § 1132 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq.; and (3) §§ 85 and 86 of the National Bank Act, 12 U.S.C. § 21 et seq.").

586 *Id.*

found that, due to the similarity of the language of the respective provisions, the exclusivity provisions of the Warsaw and Montreal Conventions have the identical effect and both treaties "preempt all state law claims within their scope."[587] The district court also noted that in *El Al Israel Airlines, Ltd. v. Tseng*,[588] the Supreme Court had interpreted the Warsaw Convention provision to preempt all claims within its scope for personal injury brought under state law, even if the result precluded recovery because the treaty does not provide liability for the damages.[589] While the *Tseng* court had not expressly stated that the Warsaw Convention "completely" preempts state law claims, "several courts have addressed that issue and taken the position that the Warsaw Convention completely preempts all claims arising out of international flights."[590]

Plaintiff argued that preemption is avoided if the state law claims are outside of the treaty's scope, relying on *Wolgel v. Mexicana Airlines*[591] and *O'Callaghan v. AMR Corp.*[592] for the proposition that breach of contract claims are not preempted by the Warsaw Convention when they do not fit into any of its three categories or seek "damages only for the nonperformance of the contract, not for any injury that occurred because of that nonperformance."[593] The district court recognized the split of authority on the issue, but was more persuaded by the reasoning favoring a finding of preemption.[594] The district court noted that the intent of the treaties was to create a uniform system of liability for situations involving international travel by air, citing the Supreme Court's statement in *Tseng* that it "would be hard put to conclude that the delegates at Warsaw meant to subject air carriers to the distinct, nonuniform liability rules of the individual signatory nations."[595] Further, the district court noted

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[587] *Id.* (quoting Paradis v. Ghana Airways Ltd., 348 F. Supp. 2d 106, 111 (S.D.N.Y. 2004)).

[588] 525 U.S. 155, 176 (1999).

[589] *Knowlton*, 2007 WL 273794, at *4.

[590] *Id.* (citing Husmann v. Trans World Airlines, Inc., 169 F.3d 1151, 1153 (8th Cir. 1999) (state personal injury claim); Singh v. N. Am. Airlines, 426 F. Supp. 2d 38, 45 (E.D.N.Y. 2006) (state personal injury claim); Donkor v. British Airways Corp., 62 F. Supp. 2d 963, 967 (E.D.N.Y. 1999) ("state tort and breach of contract claims for damages due to detention after a long delay")).

[591] 821 F.2d 442, 445 (7th Cir.), *cert. denied*, 484 U.S. 927 (1987).

[592] No. 04 C 4005, 2005 WL 1498870 (N.D. Ill. June 8, 2005).

[593] *Knowlton*, 2007 WL 273794, at *5 (quoting *O'Callaghan*, 2005 WL 1498870, at *1 n.1)

[594] *Id.*

[595] *Id.* (quoting El Al Isr. Airlines, Ltd. v. Tseng, 525 U.S. 155, 169 (1999)).

that "[a]s a matter of public policy, airlines should not be subject to contract claims in state courts involving a three-dollar breakfast."[596] Accordingly, the district court denied Plaintiff's motion to remand.[597]

2. *In re Air Crash at Lexington, Kentucky, August 27, 2006*

In *In re Air Crash at Lexington, Kentucky, August 27, 2006*,[598] the U.S. District Court for the Eastern District of Kentucky ruled on Plaintiffs' motion to remand claims for wrongful death to state court.[599] The decedent-passenger was traveling from Lexington, Kentucky, to St. Lucia on a roundtrip ticket aboard the Comair flight that crashed in Lexington.[600] Plaintiffs initially brought suit in Kentucky state court, and Defendant removed the case on the grounds that the district court had subject matter jurisdiction under the Montreal or Warsaw Conventions.[601]

Plaintiffs' motion to remand alleged, *inter alia*, that because St. Lucia was not a signatory to either the Warsaw or the Montreal Conventions, neither treaty applied to their claims.[602] Plaintiffs also argued that neither Convention applied because Plaintiffs had pled only state law claims and neither Convention was "completely" preemptive of the claims; that Defendant had waived any preemption defense by not pleading it as an affirmative defense and failing to raise it in response to Plaintiffs' remand motion; and that Defendant "must prove compliance with the contractual requirements of a convention before it may avail itself of the convention benefits."[603] In response, Defendant contended that it was not necessary for St. Lucia to have signed the treaties for them to apply;[604] it had not waived its preemption defense and would amend its pleadings accordingly; Plain-

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596 *Id.*

597 *Id.*

598 501 F. Supp. 2d 902 (E.D. Ky. 2007).

599 *Id.* at 904.

600 *Id.* at 905.

601 *Id.* (noting that Defendant had removed this and other cases on the ground of federal question jurisdiction pursuant to an international treaty).

602 *Id.*

603 *Id.* Plaintiff argued that more discovery would be required to determine whether Defendant had complied with the requirements of the Montreal Convention, specifically "regarding the e-ticket and confirmation allegedly delivered to [decedent-passenger] as to whether [Defendant] complied with the notice requirements under the convention." *Id.*

604 *Id.* Defendant argued alternatively "that St. Lucia may be considered a signatory to the Warsaw Convention because it ratified other treaties or because it was a colony at the time the United Kingdom ratified it." *Id.*

tiffs' claims were completely preempted because "federal law exclusively governs and completely preempts claims arising under the conventions;" and that it had complied with the necessary requirements of both Conventions.[605]

The district court rejected Plaintiffs' argument that neither Convention applied because St. Lucia was not a signatory to the Warsaw or Montreal Conventions, finding that "[t]he plain language of each convention includes within its scope a round-trip ticket from the United States with an agreed stopping place within another state, even if that state is not a signatory to the convention."[606] Because the decedent-passenger's ticket involved roundtrip transportation from the United States, a signatory of the Montreal Convention, it was within the scope of the Montreal Convention "notwithstanding the fact that St. Lucia is not a signatory to that convention."[607]

Turning to the preemptive effect of the Conventions, the district court surveyed the case law addressing the issue and noted that the decisions focusing on whether the Conventions are "ordinarily" or "completely" preemptive, with respect to removal jurisdiction, came to conflicting results.[608] The district court found that a more appropriate analysis focuses on the exclusivity of the Conventions, *i.e.*, "whether the claim must be brought under federal treaty law or not at all."[609] The district court noted that the procedural posture presented by a motion to remand on the grounds of jurisdiction pursuant to the Conventions "confounds the analysis somewhat by misdirecting the [court's] focus to the question of which court may hear the claim."[610] Instead, in light of the Supreme Court's decision in *El Al Israel Airlines, Ltd. v. Tseng*,[611] the district court found that "[t]he focus of the analysis should be on whether any claim within the scope of the treaties can be brought under state law."[612] The district court noted that this is broader than tradi-

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605 *Id.*

606 *Id.* at 908.

607 *Id.* Because the district court found that the claim was subject to the Montreal Convention, it did not decide whether the claim would have been subject to the Warsaw Convention. *See id.*

608 *Id.* (citing Knowlton v. Am. Airlines, Inc., No. RDB-06-854, 2007 WL 273794, at *5 (D. Md. Jan. 31, 2007) (discussing the split of authority regarding the extent of preemption under the Warsaw and Montreal Conventions)).

609 *In re Air Crash at Lexington*, 501 F. Supp. 2d at 909.

610 *Id.* at 913.

611 525 U.S. 155, 162 (1999).

612 *In re Air Crash at Lexington*, 501 F. Supp. 2d at 913.

tional conflict preemption, and in the wake of the Supreme Court's ruling in *Tseng* that claims for personal injury under state law are preempted by the Warsaw Convention, "the circuit courts considering the issue . . . all agree the Warsaw and Montreal Conventions provide the exclusive remedy for claims within the scope of the treaties."[613] The court further rejected Plaintiffs' argument that Defendant had waived the preemption defense, because Rule 12(h)(2) of the Federal Rules of Civil Procedure permits the defense of a failure to state a claim upon which relief may be granted to be raised as late as trial.[614]

On the facts of this case, the district court found that the action is "unquestionably a claim for death of a passenger . . . on board an aircraft within the scope of Article 17 of the Montreal Convention."[615] Accordingly, "assuming the Montreal Convention is applicable under the facts of this case, a cause of action pursuant to the Convention is the exclusive remedy available for Plaintiffs' claims."[616] The court thus denied Plaintiffs' remand motion, without prejudice to renew it "if subsequent discovery and briefing demonstrate that [Defendant] is not entitled to the benefits of the Montreal Convention under the facts of this case."[617]

3. Muoneke v. Compagnie Nationale Air France

In *Muoneke v. Compagnie Nationale Air France*,[618] the U.S. Court of Appeals for the Fifth Circuit addressed an action seeking recovery for the alleged theft of a digital camera and approximately $900 from Plaintiff's checked baggage.[619] Plaintiff traveled from Houston, Texas, to Lagos, Nigeria, changing aircraft in France.[620] Plaintiff alleged that after arriving in Lagos and leaving the airport, she discovered that the items were missing and therefore returned to the airport the next day where she filed a written claim with Defendant's baggage services department.[621] However, Defendant alleged that it had not received such written notice of the claim, and that because its

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613 *Id.*
614 *Id.* at 914.
615 *Id.* at 913.
616 *Id.*
617 *Id.* at 913–14.
618 No. 06-20433, 2007 WL 2710468 (5th Cir. Sept. 17, 2007).
619 *Id.* at *1.
620 *Id.*
621 *Id.*

contract of carriage required written notice to be given within seven days (as does Article 26 of the Warsaw Convention), that it had properly denied Plaintiff's claim as untimely.[622]

Plaintiff thereafter filed suit in Texas small claims court for, *inter alia*, breach of contract.[623] Defendant removed the action to the U.S. District Court for the Southern District of Texas and Plaintiff unsuccessfully moved to remand.[624] Cross-motions for summary judgment were filed and the district court granted in favor of Defendant.[625] Plaintiff appealed to the Fifth Circuit on the grounds that the district court lacked jurisdiction over her claim because the amount in controversy did not exceed $75,000.[626]

The Fifth Circuit affirmed the district court's ruling with respect to the motion to remand.[627] The Fifth Circuit found that because Plaintiff's claims involved "interpretation and application of a treaty, the Warsaw Convention," the district court properly had federal question jurisdiction over such claims and thus it was not necessary for the amount in controversy to exceed $75,000.[628] However, the Fifth Circuit concluded that the district court's summary judgment ruling was improper because Plaintiff had submitted evidence, in the form of two affidavits and a receipt from the baggage services department, in support of her allegation that she had timely filed a written complaint with Defendant.[629] The Fifth Circuit found that this evidence was sufficient to create a genuine issue of material fact precluding summary judgment, and therefore vacated the judgment and remanded the case to the district court.[630]

B. Interpreting "International Carriage"

1. *Gerard v. American Airlines, Inc.*

In *Gerard v. American Airlines, Inc.*,[631] the Connecticut Superior Court addressed whether an action for the loss of baggage occurring during a domestic leg of an otherwise international se-

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622 *Id.*
623 *Id.*
624 *Id.*
625 *Id.*
626 *Id.*
627 *Id.*
628 *Id.*
629 *Id.* at *2.
630 *Id.*
631 No. FSTCV064010485, 2007 WL 2205364 (Conn. Super. Ct. July 12, 2007).

ries of flights on another airline was governed by the Montreal Convention.[632] Plaintiff had flown from New York to Singapore, from Singapore to Tokyo, and from Tokyo to Los Angeles onboard flights contracted with Singapore Airlines.[633] Thereafter, Plaintiff flew from Los Angeles to New York onboard the subject flight, contracted with Defendant American Airlines.[634] After this domestic leg, only one of Plaintiff's two pieces of baggage was returned.[635]

Defendant moved for partial summary judgment[636] alleging the applicability of damage limitations under the Convention because the domestic leg qualified as "international" under Article 1(3).[637] Article 1(3) provides:

> Carriage to be performed by several successive carriers is deemed, for the purposes of this Convention, to be one undivided carriage *if it has been regarded by the parties* as a single operation, whether it had been agreed upon under the form of a single contract or of a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within the territory of the same State.[638]

After examining Article 1(3), the Superior Court noted that the

> Convention contemplates that an entirely domestic leg of an international itinerary will be covered by the Convention as part of one undivided [international] transportation-even if it is performed by a successive carrier and even if the various legs are agreed upon under a series of contracts-as long as it has been regarded by the parties as part of a single operation.[639]

In this respect, the Superior Court stated that "Article 1(3) requires [the court] to consider the intent of both parties to the contract" and that courts typically determine "objective intent" based upon the contract of transportation (*i.e.*, the passenger ticket), as well as extrinsic evidence (*e.g.*, relying on trade usage to decipher a flight coupon code) to understand the "objective

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632 *Id.* at *1, *3.

633 *Id.* at *3.

634 *Id.*

635 *Id.* at *1.

636 *Id.* Defendant also moved to dismiss for lack of personal jurisdiction, which the Superior Court denied as untimely. *Id.* at *1–*2.

637 *Id.* at *3.

638 *Id.* (quoting Montreal Convention, *supra* note 562, art. 1(3)).

639 *Id.* at *3 (quoting Robertson v. Am. Airlines, Inc., 401 F.3d 499, 502 (D.C. Cir. 2005)).

indicia" of the passenger ticket.[640] The Superior Court additionally noted that courts also have considered the "objective facts" relating to ticketing.[641]

The Superior Court noted that there often "must be a showing that the air carrier had knowledge that the flight in question was part of a longer, international voyage" before a court will conclude that an air carrier considered a domestic leg part of one undivided international transportation.[642] Here, neither party had submitted an authenticated copy of the contract of transportation, nor was there alternative evidence in the record sufficient to demonstrate that Defendant was aware of Plaintiff's itinerary at the time the parties entered into their contract and, thus, there was insufficient evidence to demonstrate that Defendant considered the domestic leg undivided international transportation.[643] Accordingly, the Superior Court denied Defendant's motion for partial summary judgment.[644]

C. JURISDICTION

1. Baah v. Virgin Atlantic Airways Ltd.

The decision of the U.S. District Court for the Southern District of New York in *Baah v. Virgin Atlantic Airways Ltd.*[645] involved an action commenced by Plaintiff, on behalf of his infant son, for injuries allegedly sustained when the infant was burned by a hot beverage on Defendant airline's flight from London, England, to New York, New York.[646] Plaintiff alleged that the airline was liable for his son's personal injuries under the terms of the Montreal Convention.[647]

Defendant moved to dismiss the complaint for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure or, alternatively, for summary judgment, arguing that Plaintiff's complaint failed to establish jurisdiction under Article 33 of the Montreal Convention.[648] Under Article

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640 *Id.* at *4 (quoting Coyle v. P.T. Garuda Indon., 363 F.3d 979, 990 (9th Cir. 2004)).

641 *Id.* (citing Petrire v. Spantax, S.A., 756 F.2d 263, 266 (2d Cir.), *cert. denied*, 474 U.S. 846 (1985)).

642 *Id.* (citing *Robertson*, 401 F.3d at 503; *Coyle*, 363 F.3d at 990).

643 *Id.*

644 *Id.*

645 473 F. Supp. 2d 591 (S.D.N.Y. 2007).

646 *Id.* at 592.

647 *Id.* at 593.

648 *Id.* at 592–94.

33, the court does not have jurisdiction under the Convention unless the United States is: "(1) 'the domicile of the carrier;' (2) the 'principal place of business' of the carrier; (3) the place where the carrier has a 'place of business through which the contract has been made;' (4) the 'place of destination;' or (5) the 'principal and permanent residence' of the passenger."[649] In evaluating Defendant's motion, the district court agreed with the parties that the Montreal Convention governed the action and determined that four out of the five bases for jurisdiction under Article 33 of the Convention did not apply because the United Kingdom was the Defendant airline's domicile and principal place of business, the passenger's ticket was purchased in the United Kingdom, and Plaintiff was a United Kingdom resident.[650]

Plaintiff argued that the district court had jurisdiction under the Convention on the basis of the "place of destination."[651] The infant's airline ticket provided for round trip transportation to and from London, England, with a stop in New York.[652] However, Plaintiff argued that the "place of destination" was actually New York because at the time of the accident it had not yet been determined whether the infant would return to London.[653]

In evaluating Plaintiff's argument, the district court applied the reasoning of the U.S. Court of Appeals for the Second Circuit in *Klos v. Polskie Linie Lotnicze*,[654] and interpreted "place of destination" under the Montreal Convention to mean that the ultimate destination specified by the contract of carriage was determinative on this issue and not the passenger's subjective intent.[655] The *Baah* court thereby found that London was the ultimate destination of the infant's passenger ticket.[656] Accordingly, because Plaintiff failed to establish jurisdiction under Article 33 of the Montreal Convention, the district court granted

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649 *Id.* at 594 (citations omitted).

650 *Id.*

651 *Id.*

652 *Id.*

653 *Id.*

654 133 F.3d 164, 167 (2d Cir. 1997) ("[T]he place of final destination for purposes of jurisdiction under the Warsaw Convention is the return city appearing on a round-trip ticket").

655 *Baah*, 473 F. Supp. 2d at 597 (citing *Klos*, 133 F.3d at 167–68). The *Baah* court applied the *Klos* interpretation of the term "place of destination" contained in the Warsaw Convention's Article 28 to the instant case under the Montreal Convention indicating that it found "no reason to interpret the phrase . . . differently." *Id.*

656 *Id.*

Defendant's motion to dismiss, with prejudice, for lack of subject matter jurisdiction.[657]

D. Limitation of Actions

1. *Sanchez Morrabal v. Omni Air Services, Co.*

In *Sanchez Morrabal v. Omni Air Services, Co.*,[658] the U.S. District Court for the District of Puerto Rico addressed whether a passenger's state law personal injury claims were preempted and time-barred by the Warsaw Convention.[659] Plaintiff, a member of the Puerto Rico National Guard, suffered multiple injuries as a result of falling off the passenger loading ramp while boarding Defendant Omni Air's plane in Honduras.[660] Plaintiff commenced an action for damages pursuant to, *inter alia*, the Warsaw Convention and the Puerto Rico Civil Code.[661]

Defendant moved to dismiss the complaint as time-barred by Article 29 of the Warsaw Convention because the action was not commenced within two years of the accident.[662] Before responding to the motion to dismiss, Plaintiff Sanchez, along with Co-Plaintiff, the U.S. Army, moved to amend the complaint, voluntarily dismiss all federal claims, and instead assert diversity jurisdiction and pursue only state law claims.[663] The district court granted Plaintiffs' motion to amend the complaint, and then examined Defendant's motion to dismiss the amended complaint.[664]

The parties agreed that the injury occurred in the course of embarking, as defined by Article 17, and the district court found that because Plaintiff was boarding an international flight be-

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657 *Id.*

658 497 F. Supp. 2d 280 (D.P.R. 2007).

659 *Id.* at 282.

660 *Id.* at 281–82.

661 *Id.* at 282. Plaintiff also filed claims pursuant to the Americans with Disabilities Act. *Id.* The U.S. Army appeared as Co-Plaintiff and sought "to recover 'the sum of money furnished and to be furnished to Co-Plaintiff Sanchez for care and medical treatment'" under the Medical Recovery Act, which grants the Government the right to recover the reasonable value of medical services rendered. *Id.* *See* 42 U.S.C. §§ 2651–2653 (2000) and 10 U.S.C. § 1095 (2000 & Supp. 2005).

662 *Sanchez*, 497 F. Supp. 2d at 282, 285. Defendant also moved to dismiss the claims brought pursuant to the Americans with Disabilities Act because Plaintiff was not disabled at the time of the accident, and the Medical Recovery Act because the MRA does not confer federal jurisdiction for such claims. *Id.* at 282.

663 *Id.*

664 *Id.*

tween two signatory countries under Article 1(2),[665] Plaintiffs' state law claims were preempted by Article 17 of the Convention.[666] The district court noted that all personal injury claims within the scope of Article 17 are subject to the conditions and limits of the Convention, including the two-year time limit in Article 29, and that this limit has been "consistently interpreted by federal courts as a condition precedent to suit and thus not subject to tolling."[667] Because Plaintiffs failed to satisfy this condition precedent, the district court dismissed the complaint with prejudice.[668]

2. *Onyekuru v. Northwest Airlines*

The decision of the U.S. District Court for the Northern District of Illinois in *Onyekuru v. Northwest Airlines*[669] addressed whether Plaintiff's action for pilfered baggage was barred by the two year limitation of Article 35 of the Montreal Convention.[670] In *Onyekuru*, Plaintiff was a passenger on a roundtrip flight from Chicago to Lagos, Nigeria, and, although she returned to Chicago on June 17, 2004, her baggage did not return until the following day.[671] Upon receiving her baggage, Plaintiff discovered that some of its contents were missing.[672]

Plaintiff filed a complaint against airline partners KLM and Northwest Airlines in state court more than two years after discovering that the contents of her baggage had been pilfered.[673] Defendant KLM removed the action and thereafter moved for summary judgment on the ground that Plaintiff's claims were barred by Article 35 of the Convention.[674] Article 35 provides:

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[665] *Id.* at 283–84. The court noted that, despite Plaintiffs' allegations, both Honduras and the United States were a party to the Convention. *Id.* The court also rejected Plaintiff's argument that the Convention did not apply because Plaintiff had not been issued a passenger ticket, finding that the ticketing requirement of Article 3 of the Warsaw Convention applies only to the limitation of a carrier's liability, not the Convention's applicability. *Id.* at 284 n.9.

[666] *Id.* at 284.

[667] *Id.* at 285 (citing Husmann v. Trans World Airlines, Inc., 169 F.3d 1151, 1154 (8th Cir. 1999); Fishman v. Delta Air Lines, Inc., 132 F.3d 138, 143 (2d Cir. 1998)).

[668] *Id.*

[669] No. 06 C 5054, 2007 WL 2713892 (N.D. Ill. Sept. 14, 2007).

[670] *Id.* at *1–*2.

[671] *Id.* at *1.

[672] *Id.*

[673] *Id.* at *1–*2. Plaintiff's claim against Northwest was stayed due to Northwest's filing for bankruptcy. *Id.* at *1 n.1.

[674] *Id.* at *1.

"The right to damages shall be extinguished if an action is not brought within a period of two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped."[675]

Because Plaintiff did not file her claim until well after the limitation period prescribed by Article 35, the district court held that Defendant KLM was entitled to judgment as a matter of law and granted its motion.[676]

E. Embarking and Disembarking

1. *Bunis v. Israir GSA, Inc.*

In *Bunis v. Israir GSA, Inc.*,[677] the U.S. District Court for the Eastern District of New York addressed an action arising out of injuries allegedly suffered due to Defendant's failure to provide timely wheelchair services to Plaintiff after disembarking the aircraft.[678] Plaintiff alleged that he suffered from a serious, and visible, physical handicap and a "serious heart condition," and requested a wheelchair from an employee of Defendant airline upon deplaning an international flight in New York.[679] Plaintiff waited for twenty minutes for a wheelchair and then began walking toward the baggage claim area; he began to experience chest pains at some point—after leaving the gate area but before arriving at the baggage claim area—during his walk through the international terminal.[680] Plaintiff did not reach the baggage claim area until roughly an hour later, at which point the police and medical personnel were called and Plaintiff was transported by ambulance to the hospital.[681]

Plaintiff filed a complaint against Defendant airline in state court for alleged negligence.[682] Defendant removed the action to the district court, claiming federal question jurisdiction pursuant to the Warsaw Convention.[683] Plaintiff moved to remand on the ground that his injury did not occur in the course of any of the operations of embarking or disembarking an interna-

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675 Montreal Convention, *supra* note 562, art. 35(1).
676 *Onyekuru*, 2007 WL 2713892, at *2.
677 511 F. Supp. 2d 319 (E.D.N.Y. 2007).
678 *Id.* at 320.
679 *Id.*
680 *Id.*
681 *Id.* at 320–21.
682 *Id.* at 321.
683 *Id.*

tional flight under Article 17, and therefore the Warsaw Convention did not apply to his claims.[684]

Turning to the determinative question, the district court noted that both parties had urged the court to apply the Second Circuit's test set forth in *Day v. Trans World Airlines, Inc.*[685] to determine whether Plaintiff was in the course of disembarking when the injury was sustained.[686] Under the *Day* test, a court looks to "the passengers' activity . . . to the restriction of their movements, to the imminence of boarding, or even to their position adjacent to the terminal gate" at the time of the accident.[687]

Both parties had focused their arguments on the assumption that the baggage claim area, where Plaintiff eventually received medical attention, was the location of the "accident."[688] The district court disagreed, finding that the place of the "accident" for Warsaw purposes is the place where the injury-causing event occurred under the Supreme Court's rulings in *Air France v. Saks*[689] and *Olympic Airways v. Husain.*[690]

In *Saks,* "the Supreme Court noted that the Warsaw Convention itself contains no definition of 'accident' and held 'that liability under Article 17 of the Warsaw Convention arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger.'"[691] In *Husain,* the Supreme Court further explained that "the 'accident' condition precedent to air carrier liability under Article 17 is satisfied when the carrier's unusual and unexpected refusal to assist a passenger is a link in a chain of causation resulting in a passenger's pre-existing medical condition being aggravated."[692] The *Bunis* court found that Defendant's failure to respond to Plaintiff's request for a wheelchair at the gate immediately after deplaning constituted the relevant "event or happening" because it forced Plaintiff to walk unassisted, resulting in his ultimate injury.[693] The district court thus denied Plaintiff's motion to remand, holding that Plaintiff's incident occurred during the

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684 *Id.*

685 528 F.2d 31 (2d Cir. 1975).

686 *Bunis,* 511 F. Supp. 2d at 322.

687 *Id.*

688 *Id.*

689 470 U.S. 392, 399 (1985).

690 540 U.S. 644, 646 (2004); *Bunis,* 511 F. Supp. 2d at 322–23.

691 *Bunis,* 511 F. Supp. 2d at 322–23 (citing *Saks,* 470 U.S. at 399).

692 *Id.* at 323 (citing *Husain,* 540 U.S. at 646).

693 *Id.*

course of disembarking an international flight and, accordingly, the Warsaw Convention provided Plaintiff's exclusive remedy, preempting his state law claims and conferring federal question jurisdiction.[694]

2. Maduro v. American Airlines, Inc.

In *Maduro v. American Airlines, Inc.*,[695] the Virgin Islands Superior Court analyzed whether the Warsaw Convention governed Plaintiff's causes of action relating to the conduct of airline personnel during a two-hour layover at the airport terminal.[696] Plaintiff commenced an action seeking relief under territorial law for negligent infliction of emotional distress, breach of an implied contractual duty to ensure that employees conduct themselves in a professional manner, and discrimination.[697] Plaintiff did not claim that she had sustained any physical injury related to the alleged incident.[698]

Plaintiff alleged that she approached Defendant airline's service counter to verify information relating to her connecting flight.[699] The ticket agent took her ticket, telling her that she would be called to retrieve it.[700] While waiting, Plaintiff's connecting flight was cancelled and she was placed on standby.[701] Plaintiff claimed that she "pleaded" with the ticket agent to allow her to board the flight, but was told to "shut up and take a seat," and that she might not be scheduled on any flight that day.[702]

Defendant airline moved for summary judgment, arguing, *inter alia*, that the Warsaw Convention preempted Plaintiff's territorial law claims and that the provisions of the Convention barred claims for purely emotional or psychological injuries.[703] In analyzing Defendant's motion, the Superior Court found that it initially needed to determine whether the Convention applied to Plaintiff's claims, specifically whether Plaintiff was in the process of "embarking" or "disembarking" within the meaning of

694 *Id.*
695 No. SC-98-CV-580, 2007 WL 906234 (V.I. Feb. 26, 2007).
696 *Id.* at *1.
697 *Id.*
698 *Id.*
699 *Id.*
700 *Id.*
701 *Id.*
702 *Id.*
703 *Id.*

Article 17 at the time of the alleged incident.[704] Article 17 provides:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.[705]

The Superior Court then looked to the "totality of the circumstances"[706] and applied the three-part test from *Evangelinos v. Trans World Airlines, Inc.*,[707] considering: "1) location of accident; 2) activity in which injured person was engaged and; 3) control by defendant of such injured person at location and during the activity taking place at the time of the accident."[708]

In applying these factors, the Superior Court found the facts of the case to be similar to those in *Rabinowitz v. Scandinavian Airlines*,[709] where it was determined that Plaintiff's injury on a "moving sidewalk" on her way to a connecting flight was not sufficiently proximate to be considered embarking or disembarking.[710] The court found that, like the plaintiff in *Rabinowitz*, Plaintiff had already disembarked from one flight and was preparing to embark on another.[711] The Superior Court determined that Plaintiff was even farther removed from the processes of embarking or disembarking than the *Rabinowitz* plaintiff because, *inter alia*, Plaintiff was on standby and, thus, boarding was not imminent.[712]

The Superior Court thus held that Plaintiff was neither embarking nor disembarking under Article 17 and that therefore the Warsaw Convention did not apply, denying Defendant's motion for summary judgment on this issue.[713] The Superior Court, however, granted Defendant's motion as to Plaintiff's

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704 *Id.* at *3.

705 Warsaw Convention, *supra* note 564, art. 17.

706 *Maduro*, 2007 WL 906234, at *3 (citing Day v. Trans World Airlines, Inc., 393 F. Supp. 217 (S.D.N.Y. 1975)).

707 550 F.2d 152 (3d Cir. 1977).

708 *Maduro*, 2007 WL 906234, at *3 (citing *Evangelinos*, 550 F.2d 152).

709 741 F. Supp. 441 (S.D.N.Y. 1990).

710 *Maduro*, 2007 WL 906234, at *4 (citing *Rabinowitz*, 741 F. Supp. 441 (Plaintiff was not "embarking or disembarking" even though she was "within 100 feet of the arriving gate, was within five minutes of embarking and was directed toward the sidewalk by airline personnel.")).

711 *Id.*

712 *Id.*

713 *Id.*

claims for negligent infliction of emotional distress, negligent breach of implied contractual duties, and discrimination under local law.[714]

3. Dick v. American Airlines, Inc.

The decision of the U.S. District Court for the District of Massachusetts in *Dick v. American Airlines, Inc.*[715] involved an action for personal injuries allegedly sustained by a passenger on an escalator while traveling between boarding gates at Miami International Airport.[716] Plaintiff, who was traveling from Trinidad to Canada via Miami, Florida, was allegedly injured when her elderly mother fell on her while they were using the escalator.[717] Plaintiff commenced an action alleging that Defendants American Airlines and Worldwide Flight Services, Inc.[718] were negligent under state law.[719] Defendants moved for summary judgment, arguing that Plaintiff's claims were preempted by the Warsaw Convention and therefore were barred because the claim was not brought within the two-year period prescribed by Article 29.[720]

To determine whether the accident had occurred "in the course of any of the operations of embarking or disembarking" under Article 17, the district court applied the three-part test established in *McCarthy v. Northwest Airlines, Inc.*[721] Under *McCarthy*, the court must consider "(1) the passenger's activity at the time of injury, (2) his or her whereabouts when injured, and (3) the extent to which the carrier was exercising control."[722] The district court noted that to be considered to have occurred during the process of "embarking or disembarking," an "accident" should be "closely tied to the physical activity of getting

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[714] *Id.* at *5–*6.

[715] 476 F. Supp. 2d 61 (D. Mass. 2007).

[716] *Id.* at 62.

[717] *Id.*

[718] *Id.* World Wide Flight Services, Inc. was contracted by American Airlines to provide wheelchair services to American's passengers. *Id.*

[719] *Id.*

[720] *Id.* The right to damages is "extinguished" under the Warsaw Convention if an action is not filed within the two-year period of limitation in Article 29, which is a strict condition precedent and bars any claim not brought within the two-year period. *See* Fishman v. Delta Air Lines, Inc., 132 F.3d 138, 143–44 (2d Cir. 1998) (holding that Article 29 is a strict condition precedent to a claim for damages).

[721] *Dick*, 476 F. Supp. 2d at 62–63; McCarthy v. Nw. Airlines, Inc., 56 F.3d 313 (1st Cir. 1995).

[722] *Id.* (quoting *McCarthy*, 56 F.3d at 317).

'on board the aircraft.'"[723] The district court found that Plaintiff's activity at the escalator traveling from the arrival gate to the departure gate was not "sufficiently close" to the act of boarding the aircraft and, therefore, it was not part of the "operations of embarking or disembarking" under the Convention.[724] Accordingly, the district court denied Defendants' motions, finding that the Convention did not preempt Plaintiff's state law claims and, therefore, Article 29 of the Convention did not apply and her claims were not time-barred.[725]

F. Article 17 Accidents and Bodily Injury

1. Wipranik v. Air Canada

In *Wipranik v. Air Canada*,[726] the U.S. District Court for the Central District of California addressed whether the Defendant airline was liable for injuries allegedly sustained as the result of tea spilled on Plaintiff during an international flight.[727] Plaintiff specifically alleged that she suffered second and third degree burns from tea that spilled on her lap onboard a flight from Toronto, Canada to Tel Aviv, Israel when a passenger shifted causing a cup of hot tea to slide off a tray and onto her lap.[728] Defendant moved for summary judgment arguing that the incident did not qualify as an "accident" under Article 17 of the Warsaw Convention.[729] In addition to opposing the motion, Plaintiff filed a cross-motion for summary adjudication "as to the meaning of accident but also as to Defendant's liability for her injuries."[730]

In denying Defendant's motion for summary judgment, the district court held that the events giving rise to Plaintiff's injury did qualify as an "accident" because she satisfied the definition set forth by the U.S. Supreme Court in *Air France v. Saks*.[731] *Saks* defined an "accident" as "an unexpected or unusual event or

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[723] *Id.* at 64.

[724] *Id.*

[725] *Id.*

[726] No. CV 06-3763 AHM (AJWx), 2007 WL 2441066 (C.D. Cal. May 15, 2007).

[727] *Id.* at *1.

[728] *Id.*

[729] *Id.*

[730] *Id.* at *1, *5.

[731] *Id.* at *3–*5 (citing Air Fr. v. Saks, 470 U.S. 392, 405 (1985)). Since the parties only addressed the resolution of claims under the Warsaw Convention in their moving papers, the court did not address the potential applicability of the Montreal Convention. *Id.*

happening that is external to the passenger."[732] Applying this definition, the *Wipranik* court found that: (1) the spilling of the tea was "external" to Plaintiff; (2) it was "unusual and unexpected" that the tea would fall off the tray table due to the movement of another passenger; and (3) it took place during the operation of the aircraft.[733]

The district court then granted Plaintiff's cross-motion for summary adjudication on the "accident" issue, and turned its attention to address Defendant's liability for her injuries and whether her own negligence contributed to the cause.[734] The district court granted Plaintiff's motion on this issue, finding that Defendant was liable for her injuries, at least in part, because it "ha[d] not presented sufficient evidence to create a genuine issue of material fact as to whether Plaintiff was wholly responsible for her injury."[735] However, the district court found that granting Plaintiff "complete summary judgment" as to Defendant's liability was inappropriate and the determination of how much, if any, of Plaintiff's negligence had contributed to her injury was a question for the jury.[736]

2. *Watts v. American Airlines, Inc.*

The decision of the U.S. District Court for the Southern District of Indiana in *Watts v. American Airlines, Inc.*[737] addressed whether Defendant airline's failure to recognize or respond to a heart attack suffered by a decedent passenger could constitute an "accident" under Article 17 of the Montreal Convention.[738] The decedent was a passenger on a roundtrip flight from Indianapolis, Indiana to Tokyo, Japan via Chicago, Illinois.[739] During the return flight from Tokyo to Chicago, the decedent left his seat to use the lavatory on the aircraft, and while inside suffered a heart attack.[740] He later was discovered by cleaning personnel after the flight had landed and all passengers and crew had exited, and was pronounced dead.[741]

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732 *Id.* at *3 (citing *Saks*, 470 U.S. at 405).
733 *Id.* at *5.
734 *Id.*
735 *Id.* at *6.
736 *Id.*
737 No. 1:07-cv-0434-RLY-TAB, 2007 WL 3019344 (S.D. Ind. Oct. 10, 2007).
738 *Id.* at *1–*2.
739 *Id.* at *1.
740 *Id.*
741 *Id.*

Plaintiff, the wife of the decedent and the personal representative of his estate, commenced an action against the airline alleging that it did not comply with "industry standards of care and [its] own policies and procedures" for, *inter alia*, failing to respond to alleged "visible or verbal indications" that decedent was having a heart attack onboard the aircraft.[742] Defendant moved to dismiss Plaintiff's complaint, the dispositive issue before the court being whether the alleged incident was an Article 17 "accident."[743] In analyzing Defendant's motion, the district court looked to existing precedent relating to the Warsaw Convention because there were no reported cases dealing with this specific issue under the Montreal Convention.[744]

The district court then examined several cases stating that an Article 17 "accident" results from an "unexpected or unusual event or happening that is external to the passenger, and not to the passenger's own internal reaction to the usual, normal, and expected operation of an aircraft."[745] The *Watts* court, however, found the facts and reasoning of the U.S. District Court for the Southern District of New York in *Fulop v. Malev Hungarian Airlines*,[746] where it was determined that there was a question of fact whether the airline's alleged noncompliance with procedures could be an "accident" under the Convention, particularly applicable.[747] In *Fulop*, the court denied Defendant airline's motion for summary judgment even though Plaintiff's heart attack was caused by his own internal reaction because the relevant injury was the "subsequent aggravated harms" caused by the flight crews' alleged failure to adhere "to established operational standards, rules or policies" for medical emergencies.[748] Applying this reasoning to the present case, the district court denied Defendant's motion to dismiss.[749]

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[742] *Id.* Plaintiff apparently did not identify the specific industry standards or internal policies with which the airline allegedly had failed to comply. *Id.*

[743] *Id.* at *1–*2.

[744] *Id.* at *2.

[745] *Id.* at *3 (quoting Air Fr. v. Saks, 470 U.S. 392, 405–06 (1985) (Plaintiff's permanent loss of hearing was not an "accident" because it was caused by her body's internal reaction to the normal pressurization of the aircraft cabin.)).

[746] 175 F. Supp. 2d 651 (S.D.N.Y. 2001).

[747] *Watts*, 2007 WL 3019344, at *3–*4.

[748] *Id.* at *4 (citing *Fulop*, 175 F. Supp. 2d at 663–64). After a bench trial, the *Fulop* court determined that the conduct of Defendant airline's employees did not constitute an "accident" under Article 17 and entered judgment in favor of the airline. Fulop v. Malev Hungarian Airlines, 244 F. Supp. 2d 217, 219–20, 224 (S.D.N.Y. 2003).

[749] *Watts*, 2007 WL 3019344, at *4.

3. Montanez-Baez v. Puerto Rico Ports Authority

Montanez-Baez v. Puerto Rico Ports Authority[750] addressed whether a husband's claim for emotional pain and mental anguish resulting from witnessing his wife fall on an escalator was compensable under the Warsaw Convention.[751] Plaintiffs, husband and wife, traveled from the Dominican Republic to Carolina, Puerto Rico where the wife fell on an escalator while on her way to the airport's immigration area.[752] Plaintiff wife brought claims against Defendant airline for damages relating to physical and emotional injuries allegedly sustained as a result of her fall.[753] Plaintiff husband alleged that he had experienced "'great emotional pain and mental anguish from seeing his wife suffer,'" but did not allege any physical injury.[754]

Defendant American Airlines moved, *inter alia*, to dismiss Plaintiff husband's claims because they were not recognized under the Warsaw Convention as he had not suffered any physical injury under Article 17.[755] The U.S. District Court for the District of Puerto Rico determined that the Convention applied to Plaintiffs' claims because the damages allegedly resulted from "an event that took place in the course of disembarking from an international flight" as defined under Article 17.[756] In analyzing whether Plaintiff husband's claim was recognized under the Convention, the district court followed the reasoning of the Supreme Court in *Eastern Airlines, Inc. v. Floyd*,[757] in which it was found that "an air carrier cannot be held liable under Article 17 when an accident has not caused a passenger to suffer death, physical injury, or physical manifestation of injury."[758] Therefore, the district court held that his claim was not cognizable under Article 17, and because the Convention preempted state law claims in this area as well, dismissed Plaintiff husband's claims altogether.[759]

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[750] 509 F. Supp. 2d 152 (D.P.R. 2007).

[751] *Id.* at 153, 155.

[752] *Id.* at 153.

[753] *Id.*

[754] *Id.* at 156.

[755] *Id.* The court did not address the validity of Plaintiff wife's complaints. *Id.*

[756] *Id.* at 155 (citing Acevedo-Reinoso v. Iberia Lineas Aereas de Espana S.A., 449 F.3d 7, 13 (1st Cir. 2006) ("The Convention's applicability rests on a determination of whether the passenger's injury occurred 'on board the aircraft or in the course of any of the operations of embarking or disembarking.'")).

[757] *Id.* at 156 (citing E. Airlines, Inc. v. Floyd, 499 U.S. 530, 552 (1991)).

[758] *Montanez-Baez*, 509 F. Supp. 2d at 156 (quoting *Floyd*, 499 U.S. at 552).

[759] *Id.* (citing El Al Isr. Airlines, Ltd. v. Tseng, 525 U.S. 155 (1999)).

4. Kruger v. United Airlines, Inc.

In *Kruger v. United Airlines, Inc.*,[760] the U.S. District Court for the Northern District of California addressed an action arising from injuries allegedly sustained when Plaintiff was struck by a passenger's backpack, and later fell as a result of the trauma while assisted by cabin crew.[761] Plaintiffs were husband and wife, whose suit alleged "various tort causes of action" for damages resulting from Plaintiff wife's injuries, including, *inter alia*, that she experienced "excruciating pain, terror, emotional trauma, anxiety, and fear" during the flight, and that Plaintiff husband suffered a loss of consortium.[762] In the complaint, Plaintiff wife alleged that the Warsaw or Montreal Convention should apply because the subject flight was "part of an 'undivided international carriage.'"[763] Defendant airline moved to dismiss on the grounds that Plaintiffs could not assert their claims under both the Warsaw Convention and common law.[764]

The parties subsequently agreed that the Montreal Convention, not the Warsaw Convention, applied to the claims.[765] Defendant argued that Plaintiffs' complaint failed to properly allege a cause of action under the Warsaw Convention, and the district court agreed, ordering Plaintiffs to amend their complaint accordingly.[766] However, the district court continued its substantive analysis and found that Plaintiff wife's state law negligence and emotional distress claims were preempted by the Montreal Convention.[767] The district court further found that Plaintiff wife's allegations of bodily injuries arising during the course of embarking and while onboard the aircraft satisfied the elements required to set forth a personal injury claim under Article 17 of the Convention.[768] Specifically, the district court stated that it is "unusual" to be struck by a fellow passenger's backpack during boarding and this could be found to be an "ac-

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760 481 F. Supp. 2d 1005 (N.D. Cal. 2007).

761 *Id.* at 1007.

762 *Id.* at 1006–07.

763 *Id.* at 1007.

764 *Id.*

765 *Id.* at 1008.

766 *Id.*

767 *Id.* at 1009.

768 *Id.* at 1009–10. Article 17 of the Montreal Convention provides that the carrier is liable for bodily injuries sustained by a passenger only if the "accident" that caused the injury occurred "on board the aircraft or in the course of any of the operations of embarking or disembarking." Montreal Convention, *supra* note 562, art. 17.

cident" within the meaning of Article 17.[769] The court, however, limited any potential recovery for emotional injuries to those directly relating to Plaintiff wife's alleged physical injuries.[770]

The district court also found Plaintiff husband's claim for loss of consortium was cognizable under the Convention, as Article 29 of the Convention provides a pass-through mechanism allowing application of California tort law, which permits compensatory damages for loss of consortium.[771] The parties agreed that punitive damages were not recognized by the Convention.[772] Accordingly, the district court granted Defendant airline's motion to dismiss with respect to the state law tort claims, claims for punitive damages, and emotional distress claims not arising from Plaintiff wife's alleged injuries, and denied Defendant's motion regarding failure to state a claim under the Convention.[773]

5. *Zarlin v. Air France*

In *Zarlin v. Air France*,[774] the U.S. District Court for the Southern District of New York addressed whether an air carrier could be liable under the Warsaw Convention for a passenger injury allegedly sustained as a result of another passenger reclining his seat.[775] Plaintiff, who was traveling with her husband on a flight from New York to Paris, France, alleged that she was involved in a dispute with the passenger seated in front of her after he reclined his seat, which "touched her."[776] Plaintiff thereafter was reseated with the assistance of a flight attendant, but later returned to her original seat, at which time she allegedly was struck and injured when the same passenger reclined his seat again.[777]

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769 *Kruger*, 481 F. Supp. 2d at 1010 (citing Air Fr. v. Saks, 470 U.S. 392, 405 (1985) ("accident" under the Convention means "an unexpected or unusual event or happening that is external to the passenger")).

770 *Id.* at 1009 (citing Jack v. Trans World Airlines, 854 F. Supp. 654, 658 (N.D. Cal. 1994)).

771 *Id.* (citing Carlson v. Wald, 199 Cal. Rptr. 10, 12 (1984) ("holding that the diminution of a spouse's rights of consortium is compensable where her spouse has been assaulted")).

772 *Id.* (citing *Jack*, 854 F. Supp. at 663).

773 *Id.* at 1010.

774 No. 04-CV-07408 (KMK), 2007 WL 2585061 (S.D.N.Y. Sept. 6, 2007).

775 *Id.* at *1–*3.

776 *Id.* at *1.

777 *Id.*

Defendant airline moved for summary judgment arguing, *inter alia*, that this did not constitute an Article 17 "accident" under the Warsaw Convention.[778] In analyzing the motion, the district court expressed doubt whether a passenger forcibly reclining a seat could be an "accident" under Article 17 because it probably was not "unusual or unexpected."[779] The district court found that, even assuming that this event could be deemed an "accident," Plaintiff's decision to return to her seat after having been struck by the reclining chair and subsequently relocated by airline personnel was the proximate cause of her injuries, not Defendant's action.[780] Thus, the district court granted summary judgment in favor of Defendant Air France.[781]

6. *Agravante v. Japan Airlines International Co.*

In *Agravante v. Japan Airlines International Co.*,[782] the U.S. District Court for the District of Guam addressed whether passenger injuries allegedly sustained as the result of a "standing takeoff" (*i.e.*, a common maneuver by which the brakes of the aircraft are engaged at the takeoff location, the engine is brought to a pre-determined power setting, and the brakes are released), could be an "accident" under the Warsaw Convention.[783] Plaintiff, a passenger on a flight from Japan to Guam, alleged that he sustained back injuries when the aircraft accelerated and pushed him back against his seat.[784] Plaintiff claimed to have experienced pain within twenty-four hours, but did not seek medical care until two years later.[785] In addition, Plaintiff's wife asserted a loss of consortium claim resulting from her husband's alleged injuries.[786]

Defendant airline moved for summary judgment arguing that Plaintiff's injuries were not caused by an "accident" under Article 17 of the Warsaw Convention and that there was no causal

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778 *Id.* at *4. Plaintiff's claims were governed by the Warsaw Convention since the Montreal Convention had not yet entered into force when Plaintiff was injured on September 6, 2003. *Id.* at *3.

779 *Id.* at *4. Plaintiff alleged that "the unexpected event was not the reclining of the seat but, rather, [the other passenger's] weapon[i]zing of it by employing it violently to injure her." *Id.*

780 *Id.* at *5.

781 *Id.* at *6.

782 No. 04-00036, 2007 WL 2026494 (D. Guam July 9, 2007).

783 *Id.* at *1, *4.

784 *Id.* at *1.

785 *Id.* at *2.

786 *Id.* at *1.

connection between the alleged accident and Plaintiff's injuries.[787] In support of its motion, Defendant submitted the opinion of an expert retained to perform a biomedical analysis of Plaintiff's claims.[788] The expert stated that the force from acceleration during the standing takeoff was less than normal daily activities such as sneezing.[789] Furthermore, Defendant retained a medical expert who opined that Plaintiff's alleged back injury related to degenerative changes rather than a single, traumatic event.[790]

In analyzing the motion, the district court found that there was no evidence in the record to support that the standing takeoff was "unexpected or unusual," to qualify it as an "accident" under Article 17.[791] Plaintiffs stated that at trial they would present testimony from an airline Captain that "a [standing] takeoff is not allowed at Narita Airport, and to do so would be a pilot error of judgment," but submitted no affidavit or declaration to support this assertion.[792] Defendant, however, did submit a declaration from a Captain with twenty-eight years of commercial flight experience stating that, "standing takeoffs are permitted [at Narita Airport], and . . . are routinely done."[793] As such, the court found that even if it were to give Plaintiff "the benefit of the doubt on this issue and construe the standing takeoff as an accident," it would "still have great difficulty in ruling against [Defendant]," but shifted its analysis to focus on the proximate cause element of Plaintiff's claim.[794] The district court found that there was insufficient evidence to establish a causal connection between the takeoff and Plaintiff's injuries and thereby granted Defendant's motion for summary judgment as to Plaintiff's claims.[795] The district court also granted Defendant's motion as to Plaintiff's wife's derivative loss of consortium claim as no underlying cause of action remained to support it.[796]

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787 *Id.* at *4.

788 *Id.* at *1.

789 *Id.*

790 *Id.* at *3.

791 *Id.* at *4 (quoting Air Fr. v. Saks, 470 U.S. 392, 405 (1985)).

792 *Id.*

793 *Id.*

794 *Id.* at *4–*5.

795 *Id.* at *5–*6.

796 *Id.* at *6.

G. DELAY

1. *In re Nigeria Charter Flights Contract Litigation*

The decision of the U.S. District Court for the Eastern District of New York in *In re Nigeria Charter Flights Contract Litigation*[797] involved a class action certified in 2006 of Plaintiffs who had purchased tickets prior to January 31, 2004, for travel between Nigeria and the United States, but were not transported because Defendant World Airways, Inc. ("World") had discontinued flight operations.[798] Plaintiffs alleged that World was liable under either the Warsaw or Montreal Convention for its failure to transport them and that it also was liable for breach of contract, negligence, and fraud.[799]

Defendant World moved for summary judgment arguing, *inter alia*, that the Montreal Convention preempted Plaintiffs' state law claims, that to the extent Plaintiffs' claims under the Montreal Convention were dismissed, the court should decline to exercise jurisdiction over any remaining state law claims, and that Plaintiffs' contract claims, if not preempted, should be dismissed because they were not in privity with Defendant.[800] Plaintiffs filed a cross-motion for summary judgment on their state law claims or, alternatively, on their claims under the Montreal Convention.[801]

In analyzing the motions, the district court agreed with Defendant's observation that "several courts, when presented with claims based on airlines' refusal to fly passengers, have construed those claims as sounding in delay within the scope of Article 19 of the Warsaw Convention."[802] However, the district court found that "in each of these cases . . . circumstances existed which militated in favor of a finding of delay, and [those circum-

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797 520 F. Supp. 2d 447 (E.D.N.Y. 2007).

798 *Id.* at 449.

799 *Id.*

800 *Id.* at 451.

801 *Id.*

802 *Id.* at 453 (citing, *inter alia*, Paradis v. Ghana Airways Ltd., 348 F. Supp. 2d 106, 113–14 (S.D.N.Y. 2004); Minhas v. Biman Bangl. Airlines, No. 97 CIV. 4920(BSJ), 1999 WL 447445, at *3 (S.D.N.Y. June 30, 1999); Alam v. Pak. Int'l Airlines Corp., No. 1:92-CV-04356, 1995 WL 17201349, at *2 n.9 (S.D.N.Y. July 27, 1995); Malik v. Butta, No. 92 CIV. 8703(SS), 1993 WL 410168, at *3 n.11 (S.D.N.Y. Oct. 14, 1993)). Article 19 of the Warsaw Convention provides that "[t]he carrier [is] liable for damage occasioned by delay in the transportation by air of passengers, baggage, or cargo." Warsaw Convention, *supra* note 564, art. 19.

stances] are absent here."[803] In other cases, plaintiffs had "secured alternate transportation without waiting to find out whether the defendant airlines would transport them,"[804] or "refused an offer of a later flight."[805] In other cases, plaintiffs had not alleged nonperformance, or had explicitly alleged (or had conceded that they were alleging) delay.[806]

The district court stated that "[h]ere, by contrast, [P]laintiffs have shown that World simply refused to fly them, without offering alternate transportation."[807] The district court noted that Defendant had flown 318 stranded passengers from Lagos to New York, and later returned twenty others from the United States to Lagos.[808] However, Defendant had undertaken these flights only after "disavowing any obligation to do so . . . [and] after 'considerable discussion' with the enforcement division of the United States Department of Transportation."[809] The district court noted that "many other stranded passengers were simply abandoned."[810] The district court further noted that Defendant's transportation of the first leg of Plaintiffs' flights did not alter its conclusion.[811]

In light of these facts, the district court stated that this case was analogous to the U.S. Court of Appeals for the Seventh Circuit decision in *Wolgel v. Mexicana Airlines*.[812] In *Wolgel*, plaintiffs were bumped from their international flight, and never placed

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[803] *Nigeria*, 520 F. Supp. 2d at 453. The district court did not specify the specific "circumstances" that were absent. *Id.*

[804] *Id.* (citing Oparaji v. Virgin Atl. Airways, No. 04-CV-1554 (FB), 2006 WL 2708034, at *4 (E.D.N.Y. Sept. 19, 2006); *Paradis*, 348 F. Supp. 2d at 112).

[805] *Id.* (citing Igwe v. Nw. Airlines, Inc., No. H-05-1423, 2007 WL 43811, at *1 (S.D. Tex. Jan. 4, 2007)).

[806] *Id.* (citing *Minhas*, 1999 WL 447445, at *3 n.4; *Alam*, 1995 WL 17201349, at *2–*3; *Malik*, 1993 WL 410168, at *3).

[807] *Id.*

[808] *Id.* at 451, 454. Defendant World, under a consent order issued by the Department of Transportation ("DOT"), flew 318 passengers stranded in Lagos, Nigeria back to New York; it also claimed to have paid for twenty passengers stranded in the United States to return to Lagos. The DOT also had fined Defendant $350,000 for stranding passengers in violation of numerous federal statutes and regulations. *Id.* at 451.

[809] *Id.* at 454.

[810] *Id.*

[811] *Id.* (citing Weiss v. El Al Isr. Airlines, 433 F. Supp. 2d 361, 367 (S.D.N.Y. 2006) ("[T]hat the airline provided one flight according to contract does not necessarily render the failure to provide carriage on another flight a mere delay rather than a total failure to perform.")).

[812] *Id.* (citing Wolgel v. Mexicana Airlines, 821 F.2d 442 (7th Cir. 1987)).

on another.[813] The *Wolgel* court, noting that plaintiffs "never left the airport," found that the claim sounded in nonperformance, rather than delay.[814] In order to determine whether the claims were preempted by the Warsaw Convention, the *Wolgel* court

> looked to the Convention's drafting history, and found that the delegates to the Convention had concluded that "there was no need for [a] remedy in the Convention for total nonperformance of the contract, because in such a case the injured party has a remedy under the law of his or her home country."[815]

The *Wolgel* court noted that the Convention delegates had thereby, "agreed that the Convention should not apply to a case of nonperformance of a contract."[816] The *Nigeria* court, relying on *Wolgel*, determined that, to the extent that Plaintiffs could be seen to be suing for delay under Article 19 of the Montreal Convention,[817] it would grant Defendant World's motion for summary judgment on these claims because Plaintiffs had failed to allege delay.[818] By the same reasoning, the district court determined that Plaintiffs' allegations for nonperformance (breach of contract) were not preempted by the Montreal Convention,[819] nor were their claims for fraud and negligence, and turned its attention to analyze these theories of recovery.[820]

In addressing the parties' motions on the state law claims, the district court declined to grant Plaintiffs' summary judgment motion as to the issue of breach of contract, having determined that the evidence did not clearly demonstrate that Plaintiffs purchased their airline tickets from World, instead of from Defendants Ritetime Aviation and Travel Services, Inc.[821] Similarly, evidence as to Ritetime's agency status also was in dispute which precluded the court from granting summary judgment to either

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[813] *Id.* (citing *Wolgel*, 821 F.2d at 445).

[814] *Id.*

[815] *Id.* (quoting *Wolgel*, 821 F.2d at 444).

[816] *Id.*

[817] In applying previous courts' analysis of Article 19 of the Warsaw Convention to Article 19 of the Montreal Convention, the district court noted that the "difference between the two conventions is not significant for present purposes." *Id.* at 452 n.6. Article 19 of the Montreal Convention provides that the carrier is liable for "damage occasioned by delay in the carriage by air of passengers, baggage or cargo." Montreal Convention, *supra* note 562, art. 19.

[818] *Nigeria*, 520 F. Supp. 2d at 455.

[819] The court relied on the holding of *Paradis* that the Montreal and Warsaw Conventions have "substantially the same preemptive effect." *Id.* at 453 (citing Paradis v. Ghana Airways Ltd., 348 F. Supp. 2d 106, 111 (S.D.N.Y. 2004)).

[820] *Id.* at 455.

[821] *See id.* at 456.

party on Plaintiffs' state law tort claims.[822] The district court further held that although Plaintiffs' federal claims were dismissed, it would retain jurisdiction over Plaintiffs' state law claims.[823]

2. Igwe v. Northwest Airlines, Inc.

The U.S. District Court for the Southern District of Texas in *Igwe v. Northwest Airlines, Inc.*[824] addressed whether the bumping of passengers from an international flight qualified as a "delay" under Article 19 of the Montreal Convention.[825] In *Igwe*, Plaintiffs, a father and his then four-year-old daughter, had been scheduled to travel on a flight from Houston to Nigeria.[826] Plaintiffs arrived at the Houston airport approximately two hours before the flight and proceeded to the check-in point, where the processing of their seven pieces of luggage took over an hour.[827]

During processing, Defendant airline's computer transferred Plaintiffs to a "waiting list" as per standard procedure, and Plaintiffs were issued "passenger verification cards" instead of boarding passes.[828] The passenger verification cards allowed Plaintiffs through the security checkpoint, but did not guarantee them a seat on their flight, so they were instructed to hurry through security and proceed to the check-in counter at the boarding gate to ensure that they would be assigned seats on the flight.[829]

Plaintiffs arrived at the boarding gate without first presenting themselves at the check-in counter as instructed, and therefore were denied boarding by the KLM station manager.[830] The station manager had paged Plaintiffs several times without response and, thereby, cancelled their seats and re-assigned them to wait-listed passengers.[831] Plaintiff father then refused the sta-

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[822] *See id.* at 456–69. The court discussed Plaintiffs' alternative theories of Defendant's potential liability at length, which included the relationship of principal to agent, apparent authority, and ratification, finding that there was insufficient evidence under any of these theories to warrant granting either parties' summary judgment motions regarding Plaintiffs' state law claims on these issues.

[823] *Id.* at 469, 470.

[824] No. H-05-1423, 2007 WL 43811 (S.D. Tex. Jan. 4, 2007).

[825] *See id.* at *1,*3.

[826] *Id.* at *1.

[827] *Id.*

[828] *Id.*

[829] *Id.*

[830] *Id.*

[831] *Id.*

tion manager's offer of two $500 credit vouchers and a free transfer of his tickets for a flight the following day, and instead purchased tickets, out-of-pocket, for a flight departing two days later.[832]

Plaintiffs commenced an action in state court against KLM and its partner, Northwest Airlines alleging, *inter alia*, breach of contract and negligence.[833] Defendant Northwest subsequently filed for bankruptcy, and the court issued an automatic stay.[834] Defendant KLM filed a motion for summary judgment arguing, *inter alia*, that Plaintiffs' claims were "preempted and not recognized by the Montreal Convention."[835] Because Plaintiffs did not file a response to KLM's motion, the district court accepted as true the facts as set forth by Defendant KLM.[836]

In addressing KLM's motion, the district court determined that Plaintiffs' state tort and contract law claims all resulted from their alleged "bumping" from the flight.[837] The district court additionally noted that "the Montreal Convention provides their exclusive remedy to the extent to which their claims fall within the Convention's scope."[838] The district court then addressed whether Plaintiffs' claims fell within the scope of Article 19.[839] Under Article 19 of the Convention, if bumping is classified as delay, it would enable a carrier to avoid liability for damages if it could prove that "it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures."[840]

Although there was a split of authority on the issue of whether bumping constitutes delay,[841] the court followed the decision of

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832 *Id.*

833 *Id.*

834 *Id.*

835 *Id.*

836 *Id.* (citing Lewis v. Cont'l Airlines, 80 F. Supp. 2d 686, 694 (S.D. Tex. 1999); Taylor v. Dallas County Hosp. Dist., 959 F. Supp. 373, 376 (N.D. Tex. 1996)).

837 *Id.* at *3.

838 *Id.* (citing El Al Isr. Airlines, Ltd. v. Tseng, 525 U.S. 155, 160–61 (1999)). Prior to applying the *Tseng* holding on this issue to the instant case, the district court noted that "case law interpreting the Warsaw Convention, as amended by Montreal Protocol No. 4, has equal applicability to the interpretation of the Montreal Convention for purposes of preemption." *Id.* (citing Paradis v. Ghana Airways Ltd., 348 F. Supp. 2d 106, 111 (S.D.N.Y. 2004)).

839 *Id.*

840 *Id.* (quoting Montreal Convention, *supra* note 562, art. 19).

841 *Id.* (comparing *Paradis*, 348 F. Supp. 2d at 113–14 (bumping classified as "delay" and covered under the Montreal Convention) with Weiss v. El Al Isr. Airlines, Inc., 433 F. Supp. 2d 361 (S.D.N.Y. 2006) (bumping classified as "contrac-

the U.S. District Court for the Southern District of New York in *Paradis v. Ghana Airways Ltd.*,[842] which determined that bumping constituted a delay if an airline had offered substitute transportation and the passenger refused this in order to later claim non-performance by the airline.[843] The *Igwe* court further determined that Defendant KLM "was not obligated to offer the [Plaintiffs] any compensation at all for their inability to get to the terminal in a timely fashion"[844] and held that, because Plaintiffs' claims were within the scope of Article 19, that their state law claims were preempted and subject to dismissal with prejudice.[845] Accordingly, the district court granted Defendant KLM's motion for summary judgment and ordered the case administratively closed until Northwest's bankruptcy stay of actions was lifted.[846]

3. Onwuteaka v. Northwest Airlines, Inc.

The decision of the U.S. District Court for the Southern District of Texas in *Onwuteaka v. Northwest Airlines, Inc.*[847] involved an action alleging that Plaintiffs were "not seated together" during a "family trip" to Nigeria.[848] Plaintiffs further alleged that after the flight departed Amsterdam for Nigeria, the aircraft returned to Amsterdam where they were forced to remain on the aircraft for three hours before departing again for Nigeria.[849]

Defendants, partners KLM and Northwest Airlines, removed the case to federal court and filed a motion for judgment on the pleadings.[850] The district court found that Plaintiffs' claims were preempted by the Montreal Convention[851] because they

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tual non-performance" and not preempted by the Montreal Convention) and Wolgel v. Mexicana Airlines, 821 F.2d 442 (7th Cir. 1987) (same)).

842 *Paradis*, 348 F. Supp. 2d at 114.

843 *Igwe*, 2007 WL 43811, at *3 (citing *Paradis*, 348 F. Supp. 2d at 113–14).

844 *Id.* at *4, n.14.

845 *Id.*

846 *Id.*

847 No. H-07-0363, 2007 WL 1406419 (S.D. Tex. May 10, 2007).

848 *Id.* at *1.

849 *Id.*

850 *Id.* The district court indicated that the standard for judgment on the pleadings under Rule 12(c) "is the same as that for dismissal for failure to state a claim." *Id.* (quoting Johnson v. Johnson, 385 F. 3d 503, 529 (5th Cir. 2004)).

851 *Id.* The district court noted that "courts interpreting the Montreal Convention rely on cases interpreting similar provisions of the Warsaw Convention." *Id.* at *1 n.2 (citing Baah v. Virgin Atl. Airways Ltd., 2007 WL 424993, at *4 (S.D.N.Y. 2007); Paradis v. Ghana Airways Ltd., 348 F. Supp. 2d 106, 110–11 (S.D.N.Y. 2004)).

"all occurred" onboard the international flight.[852] Plaintiffs did not allege any claims under the Convention, but mentioned Article 19[853] relating to claims for delay in their response to Defendants' motion.[854] However, the district court noted that Plaintiffs had failed to allege any damages that would be recoverable under Article 19.[855] Therefore, because Plaintiffs had failed to assert a claim for relief under the Convention, the district court granted Defendant airlines' motion.[856]

H. BAGGAGE

1. *Booker v. BWIA West Indies Airways Ltd.*

In *Booker v. BWIA West Indies Airways Ltd.*,[857] the U.S. District Court for the Eastern District of New York addressed Defendant airline's motion for partial summary judgment that Plaintiff passenger's state law claims arising from the alleged damage to, and theft of items from, Plaintiff's checked baggage were preempted by the Montreal Convention, that any potential liability was subject to the Convention's limitations, and that Plaintiff could not recover for alleged emotional injuries under the Convention.[858]

Plaintiff and her three-year-old daughter were the last passengers to board Defendant's flight from New York's JFK Airport to Georgetown, Guyana via Port of Spain, Trinidad.[859] Plaintiff claimed that after boarding the aircraft she was forced to surrender her two carry-on items against her will in exchange for two baggage claim checks.[860] The bags did not arrive at the Guyana Airport until four days later.[861] After arriving at the Guyana Airport and realizing that the bags were missing, Plaintiff completed a Baggage Claim Report listing cash and jewelry among the contents.[862] When Plaintiff finally received the delayed luggage, four days after her arrival, she allegedly discovered that several items were missing, including cash and jewelry amount-

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852 *Id.* (citing El Al Isr. Airlines, Ltd. v. Tseng, 525 U.S. 155, 160–61 (1999); Mbaba v. Societe Air Fr., 457 F.3d 496, 500 (5th Cir. 2006)).

853 Montreal Convention, *supra* note 562, art. 19.

854 *Onwuteaka*, 2007 WL 1406419, at *1.

855 *Id.*

856 *Id.* at *2.

857 No. 06-CV-2146 (RER), 2007 WL 1351927 (E.D.N.Y. May 8, 2007)

858 *Id.* at *1.

859 *Id.*

860 *Id.*

861 *Id.*

862 *Id.*

ing to $11,790.[863] Plaintiff also claimed that she suffered "great emotional stress" as a result of the delay in delivering the two bags, and that she suffered an asthma attack and swelling of her hands and feet upon discovering that the items were missing.[864]

Plaintiff filed suit in the Supreme Court of New York, Kings County, alleging causes of action for emotional distress, deceptive business practices, conversion, and negligence, and sought to recover compensatory and punitive damages for the stolen and damaged baggage.[865] Defendant removed the case to the district court, and moved for partial summary judgment on the issue that Plaintiff's state law claims were preempted by the Montreal Convention.[866] In response, Plaintiff argued that the Convention did not preempt her state law claims because it does not apply to wilful misconduct; and, in addition, that the liability limitation under the Convention did not apply because: "(1) [she] was not allowed to declare a higher value for her baggage; (2) defendant's acts amounted to wilful misconduct; and (3) the loss occurred outside the scope of the Montreal Convention."[867]

In considering the motion, the district court found that the Montreal Convention exclusively governed and preempted Plaintiff's state law claims.[868] The district court relied upon the language of Article 29 of the Convention, which provides: "In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention."[869]

The district court then rejected Plaintiff's argument that the Montreal Convention did not apply because of Defendant's alleged wilful misconduct.[870] The district court noted that Plain-

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863 *Id.*

864 *Id.* at *1, *4.

865 *Id.* at *1, *5.

866 *Id.* at *1–*2. Defendant also argued that under the Convention, Plaintiff could only recover damages for stolen and damaged baggage subject to the Convention's corresponding limitations of liability. *Id.* at *3.

867 *Id.* at *2.

868 *Id.* at *3.

869 *Id.* at *2 (quoting Montreal Convention, *supra* note 562, art. 29).

870 *Id.* at *3. In applying cases interpreting the preemption provision of the Warsaw Convention to the subject claims under the Montreal Convention, the court noted the holding of *Paradis v. Ghana Airways Ltd.*, that the "preemptive effect of [the] Montreal Convention is 'substantially the same' as that of [the] Warsaw Convention." *Id.* at *2 (citing Paradis v. Ghana Airways Ltd., 348 F. Supp. 2d 106, 111 (S.D.N.Y. 2004)).

tiff had not offered any case law supporting the proposition that "wilful misconduct creates an exception to the applicability of the Montreal Convention,"[871] nor was it persuaded by Plaintiff's reliance on Justice Stevens' *Tseng* dissent[872] and the Ninth Circuit's decision in *Koirala v. Thai Airways International, Ltd.*[873] The district court noted that it was not bound to follow a dissenting opinion, and distinguished Plaintiff's interpretation of *Koirala* from the actual holding, in which the Ninth Circuit "held that a finding of wilful misconduct lifted the Warsaw Convention's cap on damages, *not* that it created an exception to the Convention's applicability."[874] The *Booker* court further noted that Article 22 of the Montreal Convention makes clear that only the provisions limiting a carrier's liability to specified amounts do not apply in cases involving wilful misconduct, not that the Convention itself would not apply.[875] Because Plaintiff's claims for damages resulted from the seizure of her baggage on the aircraft and the damage to and delayed arrival of her baggage, and the Convention provides the exclusive remedy for such claims, the district court found Plaintiff's claims were within the scope of the Convention, and therefore all state law claims were preempted.[876]

With respect to Plaintiff's claim for emotional distress, the district court noted that the Montreal Convention sets forth "three situations in which a carrier is liable: (1) death or bodily injury of passengers; (2) damage to baggage; and (3) delay of passengers, baggage and cargo."[877] Further, under Article 17(1) of the Convention, a carrier is liable for the "death or bodily injury of a passenger caused by an accident either on board the aircraft, or in the course of any of the operations of embarking or disembarking."[878]

After noting that emotional injuries "are not recoverable under the Montreal Convention unless they were caused by

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871 *Id.* at *3.

872 El Al Isr. Airlines, Ltd. v. Tseng, 525 U.S. 155, 177–81 (1999) (Stevens, J., dissenting)). In his dissent in *Tseng*, Justice Stevens argued that "the Warsaw Convention was not intended to shield carriers from liability for acts involving wilful misconduct." *Id.* at *3 n.4 (citing *Tseng*, 525 U.S. at 177–81).

873 *Id.* at *3 (citing Koirala v. Thai Airways Int'l, Ltd., 126 F.3d 1205 (9th Cir. 1997)).

874 *Id.* (citing *Koirala*, 126 F.3d at 1209).

875 *Id.*

876 *Id.*

877 *Id.* at *4 (citing Montreal Convention, *supra* note 562, art. 29).

878 *Id.* (citing Montreal Convention, *supra* note 562, art. 17(1)).

physical injuries,"[879] the district court found that Plaintiff's alleged asthma attack, and resulting swelling of her hands and feet, was caused by the alleged theft of the contents of her baggage and not the seizure of her baggage.[880] Therefore, the district court found that even if Plaintiff's complaint was read to state a cause of action for bodily injury, it was "not caused by an accident on board the aircraft or in the course of embarking or disembarking," and that Plaintiff had "failed to establish liability under Article 17(1) of the Montreal Convention."[881]

With respect to Defendant's motion regarding the Convention's limit of liability for the alleged stolen and damaged baggage, the district court noted that under Article 17(2) of the Convention, "a carrier is liable for damage sustained in the case of 'destruction or loss of, or damage to checked baggage' if the loss or damage occurred on board the aircraft or 'during any period within which the checked baggage was in the charge of the carrier.'"[882] The district court found that the alleged damage occurred while the checked baggage was in the "charge of" Defendant, and therefore Plaintiff's claim was within the scope of the Convention.[883]

Defendant did not contest that it could be liable for damage to Plaintiff's baggage, but rather, that if it were found liable, its liability was limited to 1,000 Special Drawing Rights pursuant to Article 22(2) of the Convention.[884] Under Article 22(2), "a carrier is only liable for 1,000 Special Drawings Rights, unless the passenger made a special declaration of interest at the time the baggage was handed over to the carrier."[885] Furthermore, Article 22(5) provides, *inter alia*, that Article 22(2) "does not apply if the 'damage resulted from an act or omission of a servant or agent . . . done with intent to cause damage or recklessly and with knowledge that damage will probably result . . . provided

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879 *Id.* (citing Ehrlich v. Am Airlines, Inc., 360 F.3d 366, 369–400 (2d Cir. 2004) ("a carrier is liable for mental injuries only to the extent that they were caused by bodily injuries"); E. Airlines, Inc. v. Floyd, 499 U.S. 530, 552 (1991) ("carriers are not liable for purely mental injuries")).

880 *Id.*

881 *Id.* The district court further found that Plaintiff could not recover for emotional injuries allegedly caused by the delay of baggage. *Id.* at *4 n.6.

882 *Id.* at *4 (quoting Montreal Convention, *supra* note 562, art. 17(2)).

883 *Id.*

884 *Id.*

885 *Id.* (citing Montreal Convention, *supra* note 562, art. 22(2)).

that such servant or agent was acting within the scope of its employment.' "[886]

The district court was not aware of any case law addressing Article 22(5) of the Montreal Convention, and therefore relied on case law interpreting the Warsaw Convention in which the corresponding provision is "substantively the same,"[887] in finding that theft by an employee is outside the scope of employment and did not remove the liability limitation.[888] As a result, the *Booker* court found that Defendant's liability for damage to and theft from Plaintiff's baggage was limited to 1,000 Special Drawing Rights.[889] Furthermore, the district court stated that Plaintiff could not recover punitive damages under the Montreal Convention.[890] Accordingly, the district court granted Defendant's motion for partial summary judgment.[891]

I. DELIVERY OF CARGO

In 2007, the International Air Transport Association ("IATA") approved Resolution 600b.[892] Resolution 600b sets forth new Conditions of Contract to be incorporated in air waybills that took effect on March 17, 2008.[893] The Resolution provides notice that either the Warsaw Convention or the Montreal Convention may govern international transportation, and requires that carriers provide notice of the applicable liability limitations for the "loss of, damage or delay to cargo" in their Conditions of Contract.[894] When defining such limits, carriers are permitted

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886 *Id.* (quoting Montreal Convention, *supra* note 562, art. 22(5)).

887 *Id.* at *5 (citing Paradis v. Ghana Airways Ltd., 348 F. Supp. 2d 106, 111 (S.D.N.Y. 2004)).

888 *Id.* (citing Brink's Ltd. v. S. African Airways, 94 CIV. 1902 (HB), 1995 WL 225602, at *3 (S.D.N.Y. Apr. 17, 1995), *rev'd on other grounds*, 93 F.3d 1022 (2d Cir. 1996)).

889 *Id.*

890 *Id.* Article 29 of the Convention provides that "punitive, exemplary or any other non-compensatory damages shall not be recoverable." *Id.* (quoting Montreal Convention, *supra* note 562, art. 29). The district court did not address Plaintiff's claim "that she was not permitted to declare a higher value for her baggage," as it found Defendant's liability limited on other grounds, but noted that she had failed to allege any facts to support this claim. *Id.* at *5 n.7.

891 *Id.* at *5. Plaintiff has appealed to the U.S. Court of Appeals for the Second Circuit and a decision is expected in 2008.

892 IATA, New IATA Air Waybill Conditions of Contract, http://www.iata.org/whatwedo/cargo/resolution600b.htm (last visited June 15, 2008).

893 *Id.*

894 Int'l Air Transp. Ass'n, *Air Waybill—Conditions of Contract*, Res. 600b (Mar. 17, 2008), *available at* http://www.iata.org/NR/rdonlyres/9B4A04A3-2383-4D62-84B5-B632DD42D2BB/0/Resolution_600b.pdf.

to treat the limit of 250 French gold francs per kilogram under the Warsaw Convention as the conversion equivalent of seventeen Special Drawing Rights[895] from the Montreal Convention, which should then be converted to the applicable national currency.[896]

1. Wea Farms v. American Airlines, Inc.

In *Wea Farms v. American Airlines, Inc.*,[897] the U.S. District Court for the Southern District of Florida addressed whether Defendant airline's alleged failure to promptly notify the consignee[898] upon arrival of the goods was the proximate cause of spoilage of a shipment of asparagus.[899] Plaintiff, a grower and shipper of asparagus, had contracted with a freight forwarder[900] to transport a shipment of asparagus (the "consignment") from Lima, Peru to Miami, Florida on Defendant American Airlines' flight.[901] Defendant allegedly failed to notify the customs broker[902] for the consignment until over eighteen hours after its arrival, and did not store the cargo in refrigerated facilities.[903] Later, the condition of the asparagus was brought to Defendant's attention, and the consignment then was moved to a refrigerated storage facility.[904] A surveyor subsequently determined that the asparagus "had suffered severe heat damage," and it was deemed a "total loss."[905]

Plaintiff commenced an action for damages in state court alleging causes of action for "bailment . . . negligence . . . and

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[895] *Id.* A Special Drawing Right ("SDR") is an international reserve asset currently equal to approximately $1.59 USD. *See* International Monetary Fund, Factsheet-Special Drawing Rights (SDRs), (Apr. 2008), http://www.imf.org/external/np/exr/facts/sdr.htm.

[896] *Air Waybill—Conditions of Contract, supra* note 894.

[897] No. 05-22587-CIV, 2007 WL 1173077 (S.D. Fla. Apr. 18, 2007).

[898] The consignee is the party to receive the consigned shipment, and the consignor is the party transferring the consigned shipment. *See* BLACK'S LAW DICTIONARY 307 (8th ed. 2004).

[899] *See Wea Farms*, 2007 WL 1173077, at *3–*4.

[900] A freight forwarder is a party whose business is to arrange the documentation and transportation for the shipment of goods from the consignee to the consignor. *See* BLACK'S LAW DICTIONARY 666 (8th ed. 2004).

[901] *Wea Farms*, 2007 WL 1173077, at *1.

[902] A customs broker is the party who facilitates the "clearing" of shipments of goods through customs barriers for importers and exporters. *See* BLACK'S LAW DICTIONARY 386 (8th ed. 2004).

[903] *Wea Farms*, 2007 WL 1173077, at *2.

[904] *Id.*

[905] *Id.* at *2–*3.

breach of contract."[906] Defendant removed the case to federal court and the parties consented to a non-jury trial.[907] Both parties agreed that the Montreal Convention governed the international transport of the consignment.[908] Under Article 18 of the Convention, the carrier is liable for damage to the cargo sustained during carriage by air.[909] Following a bench trial,[910] the district court relied on the authority of *Offshore Aviation v. Transcon Lines, Inc.*[911] in stating that "a prima facie case of absolute liability under the Convention is established upon a showing that the goods were delivered to the carrier in good condition, were delivered to the consignee at destination in damaged condition, and resulted in a specified amount of damage."[912] The district court concluded that the evidence clearly indicated that the goods were delivered to Defendant in "good condition" and thereafter to Plaintiff in "bad condition," but there was still a need to determine whether Defendant's failure to notify Plaintiff was the proximate cause of the damage.[913] The district court noted that Article 13 of the Montreal Convention obligates the carrier to notify the consignee "as soon as the cargo arrives," and thereby held that Defendant's failure to notify Plaintiff of the consignment's arrival was the proximate cause of the damage.[914] The district court rejected Defendant's argument that Plaintiff's failure to properly package the asparagus caused its spoilage, and thereby awarded Plaintiff its full damages and prejudgment interest.[915]

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906 *Id.* at *1.

907 *Id.*

908 *Id.* at *3.

909 Montreal Convention, *supra* note 562, art. 18. Article 18 provides that "the carrier is liable for damage sustained in the event of the destruction or loss of or damage to, cargo upon condition only that the event which caused the damage so sustained took place during the carriage by air [or while] in the charge of the carrier." *Id.*

910 *Wea Farms*, 2007 WL 1173077, at *1.

911 831 F.2d 1013 (11th Cir. 1987).

912 *Wea Farms*, 2007 WL 1173077, at *3. In *Offshore Aviation*, the court interpreted the cargo provisions of the Warsaw Convention, but the *Wea Farms* court applied this interpretation to the substantially similar provisions of the Montreal Convention. *Id.*

913 *See id.* at *4.

914 *Id.* Article 13 of the Montreal Convention provides that "unless it is otherwise agreed, it is the duty of the carrier to give notice to the consignee as soon as the cargo arrives." Montreal Convention, *supra* note 562, art. 13.

915 *Wea Farms*, 2007 WL 1173077, at *4–*5.

2. O'Gray Import & Export v. British Airways PLC

In *O'Gray Import & Export v. British Airways PLC*,[916] the U.S. District Court for the District of Maryland addressed whether Plaintiff failed to comply with the notice requirements for cargo shipments under the Warsaw Convention.[917] Plaintiff was an import/export company that contracted with Defendant airline to transport smoked fish from Accra, Ghana to Baltimore, Maryland via London, England.[918] The cargo arrived in Baltimore five days late, and then was mistakenly delivered to another shipper by airline employees causing a delay in inspection by the Food & Drug Administration ("FDA").[919] The FDA released the cargo to Plaintiff, but placed a "hold" on it due to evidence of mold, and two weeks later determined that the fish could not be sold to the public, denied entry of the shipment, and ultimately had the cargo destroyed.[920]

Plaintiff submitted a written claim to Defendant airline over one month after it had received the damaged cargo, seeking the value of the destroyed fish and shipping costs.[921] Defendant refused to pay the claim because Plaintiff did not comply with the notice requirements contained in the air waybill.[922]

Plaintiff thereafter commenced an action against Defendant alleging that it "breached its duty of care and responsibilities and was negligent in delivering the goods to the wrong shipper."[923] Defendant moved for summary judgment on the grounds that Plaintiff failed to comply with the notice requirements of Article 26 of the Warsaw Convention.[924] In evaluating Defendant's motion, the district court found that although it was not clear when the mold developed on the cargo, because the cargo was within the "charge" of Defendant until it was re-

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916 No. RDB-06-1020, 2007 WL 1378391 (D. Md. May 4, 2007).

917 *Id.* at *1.

918 *Id.*

919 *Id.*

920 *Id.*

921 *Id.*

922 *Id.* The air waybill required that notice be given within twenty-one days of the cargo being "placed at his disposal." *Id.* at *1 n.2.

923 *Id.* at *2.

924 *Id.* at *3. The Montreal Convention was not applicable in this case because Ghana was not a party to it. *Id.* at *3 n.4. Article 26 of the Warsaw Convention provides different time frames for notice depending on whether the cargo was lost, damaged, or destroyed and that "in the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within . . . fourteen days from the date of receipt in the case of cargo." Warsaw Convention, *supra* note 564, art. 26.

leased to Plaintiff, any damage had occurred during its "carriage by air," and, therefore, Article 18 of the Warsaw Convention applied.[925] The district court then shifted its analysis to what the applicable notice requirement was under Article 26, depending on whether the cargo was deemed "lost, damaged, or destroyed."[926] The district court determined that the cargo was not "destroyed" as Plaintiff contended, or else the FDA would have immediately denied its entry, and thus that the fourteen day "damaged" notice requirement applied in this case.[927] The district court thereby granted Defendant's motion for summary judgment, holding that Plaintiff's claims were barred for failure to comply with the applicable notice requirements of the Warsaw Convention.[928]

3. Nipponkoa Insurance Co. v. Globeground Services, Inc.

Nipponkoa Insurance Co. v. Globeground Services, Inc.[929] addressed whether the Warsaw Convention's limit of liability applied to Plaintiff's claims for the theft of a shipment of computers.[930] Defendant Globeground North America, LLC managed Nippon Cargo Airlines' warehouse at Chicago's O'Hare International Airport, where a shipment of 240 laptop computers was being stored after arriving on a Nippon flight from the Philippines.[931] The next morning, Defendant's employee released the laptops to an individual with paperwork purporting to authorize him to take delivery.[932] Later that day, it was discovered that this individual had stolen the laptops when the consignee appeared at the warehouse to accept delivery.[933]

Plaintiff, as the insurer of the computers, brought a subrogated action in state court alleging claims for, *inter alia*, negligence, breach of contract, and conversion.[934] Defendant Globeground filed a third-party claim for contribution against

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925 *O'Gray*, 2007 WL 1378391, at *3. Article 18 of the Warsaw Convention is, in pertinent part, substantively identical to Article 18 of the Montreal Convention. *See* Montreal Convention, *supra* note 562, art. 18; Warsaw Convention, *supra* note 564, art. 18.

926 *O'Gray*, 2007 WL 1378391, at *4.

927 *Id.*

928 *Id.* at *5.

929 No. 04 C 5648, 2007 WL 2410292 (N.D. Ill. Aug.17, 2007).

930 *Id.* at *1.

931 *Id.* at *2.

932 *Id.*

933 *Id.*

934 *Id.*

Worldwide Flight Services, Inc., to which it subcontracted certain management services, including document handling, at the Nippon warehouse.[935] Defendant Globeground removed the action to federal court based on diversity jurisdiction.[936]

Defendant Globeground subsequently moved for partial summary judgment arguing that its liability was limited to $20,000 under Article 22 of the Warsaw Convention.[937] Third-party Defendant Worldwide moved for summary judgment to dismiss the third party complaint "on the ground that [P]laintiff's claims have no merit, or alternatively to impose the Warsaw Convention limits."[938]

Plaintiff argued that the Warsaw Convention did not apply to its claims because Defendant Globeground was not acting as an "agent, servant, or representative of [Nippon]," which had issued the air waybill.[939] Plaintiff, relying on portions of the April 1998 International Air Transport Association ("IATA") Main Agreement and Annex A of the Standard Ground Handling Agreement, as memorialized and modified by Annex B2.0, which Nippon and Globeground signed in June 2001 ("Standard Ground Handling Agreement"),[940] claimed that Globeground was an independent contractor.[941] Specifically, Plaintiff stated that a provision in the Standard Ground Handling Agreement provided that: "Notwithstanding anything to the contrary contained herein, the Carrier [Nippon] and Handling Company [Globeground] are not joint employers but are independent contractors and the Carrier shall in no way be con-

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935 *Id.*

936 *Id.* Globeground had also removed on the basis of federal question jurisdiction but the court held that this would be improper because "the Warsaw Convention did not completely preempt the field such that the state law claims were actually federal claims." *Id.* (citing Nipponkoa Ins. Co. v. Globeground Serv., Inc., No. 04 C 5648, 2006 WL 2861126, at *3 (N.D. Ill. Sept. 28, 2006)).

937 *Id.* at *1, *3 n.3.

938 *Id.* at *1.

939 *Id.* at *3.

940 The Standard Ground Handling Agreement provided that Globeground employees were to meet Nippon's "Service Standards" and Nippon determined the staffing requirements and work schedules. *See id.* Nippon and Globeground were to coordinate training requirements. *Id.* Globeground hired the employees (subject to Nippon consent for supervisory personnel) and was responsible for ensuring that its employees met required standards. *Id.* If, however, the Globeground employees did not meet its standards, Nippon could request their replacement. *Id.* The district court also noted that there was no allegation that the actual practices of Nippon and Globeground were different than those set forth in the Standard Ground Handling Agreement. *Id.*

941 *Id.* at *3–*4.

strued to mean the employer or co-employer of any and all persons of the Handling Company assigned to the Services hereunder."[942] The U.S. District Court for the Northern District of Illinois, in evaluating Plaintiff's claim, stated that this provision did not relate to whether Globeground was an independent contractor, but rather whether employees retained by Globeground should be considered employees of Nippon as well.[943] In this regard, the district court noted that "[a] person may be another's agent without also being an employee (servant). Also agent and independent contractor are not mutually exclusive categories."[944]

In finding that Defendant Globeground was acting as an agent of Nippon and, thus, the Warsaw Convention governed Plaintiff's claims, the district court stated:

> Under the terms of their contract, [Nippon] had general control over [Globeground]. [Nippon] established the number and schedules for [Globeground] employees and required that the employees have particular qualifications and perform up to specific standards. All [Globeground] supervisory employees had to be specifically approved by [Nippon]. That is sufficient control . . . for [Nippon] to be considered an agent in the broad sense of that term, which is all that is required under the Warsaw Convention.[945]

Third-party Defendant Worldwide argued that Plaintiff's state law claims were preempted by the Warsaw Convention and should be dismissed.[946] The district court disagreed, ruling that "[P]laintiff may still pursue its state law claims, but under the strict or presumed liability approach of the Convention and subject to the liability limits of the Convention."[947] The district court continued holding that Plaintiff's cause of action was "not subject to dismissal simply because the claims are labeled as state law claims."[948]

Plaintiff then argued that the Warsaw Convention's limitation of liability should not apply because Globeground did not have

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942 *Id.* at *4.

943 *Id.*

944 *Id.*

945 *Id.*

946 *Id.*

947 *Id.* at *5.

948 *Id.* at *6.

adequate procedures or training, and this failure constituted "wilful misconduct."[949] The district court noted, however, that:

> The mere failure to follow applicable or appropriate procedures is negligence, not wilful misconduct. . . . To be wilful misconduct, any failure to perform such procedures must be accompanied by an intent to cause harm or be reckless in that the actor had knowledge that the conduct would probably result in damage.[950]

The district court noted that recklessness required "subjective awareness that one is doing something wrong," and the potential risks must be "serious and likely to occur."[951] The district court then rejected Plaintiff's argument because the evidence presented did not support "anything beyond negligence."[952]

Accordingly, the district court granted Defendant's and Third-Party Defendant's motions for partial summary judgment on the issue of limitation of liability and dismissed Plaintiff's claims for breach of contract, gross negligence, and conversion.[953]

IV. DEEP VEIN THROMBOSIS

Courts continue to address claims by or on behalf of passengers against air carriers relating to deep vein thrombosis ("DVT").[954] DVT is a medical condition that occurs when a thrombus (*i.e.*, a blood clot) forms in a deep vein, usually in the extremities of the leg.[955] DVT can result in serious injury or death if the thrombus breaks off and lodges in the brain, lungs, or heart, which could cause a heart attack, stroke, or other debilitating effects.[956] Although plaintiffs generally have been unsuccessful in persuading courts to find any liability on the

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[949] *Id.* Article 25 of the Warsaw Convention provides that the Article 22 limits of liability "shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that . . . he was acting within the scope of his employment." Warsaw Convention, *supra* note 564, art. 25.

[950] *Nipponkoa*, 2007 WL 2410292, at *6.

[951] *Id.*

[952] *Id.* at *7.

[953] *Id.* at *8.

[954] *See, e.g.*, *In re* Deep Vein Thrombosis Litig., No. 04-1606 VRW, 2007 WL 3010564 (N.D. Cal. Oct. 12, 2007).

[955] *Id.* at *1.

[956] *Id.*

part of air carriers relating to these claims, plaintiffs have avoided dismissal of their claims in specific factual situations.

A. MULTIDISTRICT LITIGATION

In 2004, the Judicial Panel on Multidistrict Litigation centralized pre-trial proceedings for all cases brought in the United States by Plaintiffs who allegedly suffered, or sued, on behalf of an individual who allegedly suffered from a DVT related injury during or after domestic or international travel onboard commercial aircraft.[957] All of the transferred cases were assigned to Chief Judge Vaughn Walker in the Northern District of California (San Francisco).[958] To date, a majority of these DVT cases have been dismissed.[959] In February 2005, Judge Walker granted summary judgment in seventeen cases in favor of Boeing, the manufacturer of the aircraft in question.[960]

1. Domestic Flight

a. Montalvo v. Spirit Airlines

In *Montalvo v. Spirit Airlines*,[961] the U.S. Court of Appeals for the Ninth Circuit addressed negligence claims against various airlines alleging that they had failed to warn passengers about the risk of developing DVT, and failed to inform passengers about steps they could have taken during the flights to mitigate any risk of DVT.[962] Additionally, Plaintiffs alleged that the airlines provided an unsafe seating configuration by limiting each passenger's legroom.[963]

The U.S. District Court for the Northern District of California had dismissed all claims against the Defendant airlines including domestic flights (the "non-Warsaw cases") on the ground of federal preemption.[964] Fourteen plaintiffs appealed the district court's decision that the failure to warn claims were impliedly

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957 *See id.*

958 *Id.*

959 *Id.*

960 *Id.* (citing *In re* Deep Vein Thrombosis Litig., 356 F. Supp. 2d 1055, 1071 (N.D. Cal. 2005)).

961 508 F.3d 464 (9th Cir. 2007).

962 *Id.* at 469.

963 *Id.*

964 *In re* Deep Vein Thrombosis Litig., No. 04-1606 VRW, 2005 WL 591241, at *3 (N.D. Cal. Mar. 11, 2005).

preempted by the Federal Aviation Act, and the unsafe-seating-configuration claims were expressly preempted by the ADA.[965]

The Ninth Circuit affirmed the district court's ruling with respect to failure to warn, following the Third Circuit's reasoning in *Abdullah v. American Airlines, Inc.*,[966] which found that the Federal Aviation Act preempted the field of aviation safety.[967] The Ninth Circuit began its preemption analysis by noting that Congress may preempt state law expressly, or preemption may be implied where: (1) "a state law actually conflicts with federal law or when a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the federal law" ("conflict preemption"); or (2) federal regulation of a legislative field is so comprehensive that it indicates Congress's intention that the States be precluded from legislating in the same field ("field preemption").[968]

While the breadth of a statute alone is normally insufficient to support a finding of field preemption, the Ninth Circuit noted that it also may consider regulations passed pursuant to the statute in determining Congressional intent "unless it appears from the underlying statute or its legislative history that Congress would not have sanctioned the preemption."[969] The Ninth Circuit found that the legislative history and language of the Federal Aviation Act "illustrates Congress' intent to make the Federal Aviation Administration the sole arbiter of air safety."[970] In turn, the Administration's regulations not only established a general standard of care for aircraft operators, but also specifically addressed warnings and instructions that passengers must be given in particular situations.[971] Reading the regulations in conjunction with the Federal Aviation Act itself led the court to its holding that "federal law occupies the entire field of aviation safety."[972] Accordingly, the Ninth Circuit found that Plaintiffs' failure-to-warn claims were preempted by the Federal Aviation Act and affirmed the district court's holding that "because there is no federal requirement that airlines warn passengers about

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965 *Montalvo*, 508 F.3d at 467–68.

966 *Id.* at 473 (citing Abdullah v. Am. Airlines, Inc., 181 F.3d 363, 365 (3d Cir. 1999)).

967 *Id.*

968 *Id.* at 470.

969 *Id.* at 470–71.

970 *Id.* at 472.

971 *Id.*

972 *Id.* at 473.

the risk of developing DVT, Plaintiffs' negligence claim fails as a matter of law."[973]

However, the Ninth Circuit reversed and remanded the district court's finding that the unsafe seating configuration claims were preempted by the ADA.[974] The Ninth Circuit relied on the Supreme Court's findings in *Morales v. Trans World Airlines, Inc.*,[975] and *American Airlines v. Wolens*,[976] "that only those state laws that have a significant effect on prices are preempted by the ADA."[977] Because Defendants had not produced any evidence on the issue, nor had Plaintiffs conceded that the changes to the seating configuration would materially affect the price of airline tickets, the Ninth Circuit found that "[w]ithout more factual development, we cannot determine whether the preemptive reach of *Morales* extends as far as the seating configuration issue presented in this case," and accordingly reversed and remanded the case for further factual development of the record.[978]

2. *International Flight*

Many of the approximately fifty cases involving DVT related injuries arising out of international flights (the "Warsaw cases") have been dismissed.[979] In August 2006, the U.S. District Court for the Northern District of California granted summary judgment in thirty-seven Warsaw cases in which the Article 17 "accident" alleged was either "the onset of DVT or the absence or insufficiency of a warning regarding DVT or policy level decisions regarding the same."[980] The following addresses several of the cases that remained.

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[973] *Id.* at 474.

[974] *Id.* at 476.

[975] 504 U.S. 374 (1992).

[976] 513 U.S. 219 (1995).

[977] *Montalvo*, 508 F.3d at 475.

[978] *Id.* at 475–76.

[979] *In re* Deep Vein Thrombosis Litig., No. 04-1606 VRW, 2007 WL 3010564, at *1 (N.D. Cal. Oct. 12, 2007).

[980] *Id.* (quoting *In re* Deep Vein Thrombosis Litig., No. MDL 04-1606 VRW, 2006 WL 2547459, at *12 (N.D. Cal. Aug. 21, 2006)).

a. In re Deep Vein Thrombosis Litigation: Halterman v. Delta Airlines, Inc., Qantas Airways, Ltd. and Skywest, Inc.

In *Halterman v. Qantas Airways*,[981] the district court addressed whether a DVT allegedly resulting from, *inter alia*, an unplanned layover and "prolonged sitting" could constitute an Article 17 "accident" under the Warsaw Convention.[982] Plaintiff filed a complaint alleging causes of action for failure to warn[983] and personal injury under Article 17.[984] Specifically, Plaintiff alleged that the DVT was caused by several conditions on the aircraft, including cramped seating, layover, dehydration, and being "rendered immobile as the result of sleeping passengers, the 'fasten safety belt' sign and the flight attendants' service of in-flight meals."[985]

Defendant Qantas moved for summary judgment, arguing that Plaintiff had failed to produce any support for his allegation that he developed DVT as a result of an "accident" within the meaning of Article 17 of the Warsaw Convention.[986] In opposition, Plaintiff argued that three events were "unusual or unexpected and external to him" and caused his DVT: (1) "delay as the result of the stopover in Sydney;" (2) "atypical turbulence which . . . forced him to stay seated;" and (3) "inadequate pressurization or inadequate oxygen supply."[987] The district court concluded that Plaintiff's allegation that there "might have been inadequate pressurization or inadequate oxygen supply because he felt that the air was stuff[y]" was insufficient to overcome summary judgment.[988] The district court found that this allegation was contrary to Plaintiff's deposition testimony where he admitted he had "no reason to believe that there was irregular altitude [or] inadequate air circulation . . . on the flight."[989]

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981 *Id.* Unless otherwise indicated, all citations to *Halterman* reference the court's Oct. 12, 2007 amended order, which clarified the court's previous opinion on certain issues. *Id.* The court's original opinion in *Halterman* is located at: *In re* Deep Vein Thrombosis Litig. (Halterman v. Qantas Airways), No. 04-3953, 2007 WL 2029326 (N.D. Cal. July 10, 2007).

982 *See In re Deep Vein Thrombosis Litig.*, 2007 WL 3010564, at *8, *10.

983 Plaintiff's failure to warn claim previously was rejected by the court. *Id.* at *2.

984 *See id.*

985 *See id.* at *2, *4.

986 *See id.* at *1, *4.

987 *Id.* at *7 (citations omitted).

988 *Id.* at *10.

989 *Id.*

The district court stated that an unplanned layover could be a link in the chain of causation, but that there was no evidence that the layover here actually caused Plaintiff's injury.[990] Finally, the district court noted that "the facts cast significant doubt" on Plaintiff's allegation that atypical turbulence during the flight caused his DVT because it forced him to remain seated.[991] Plaintiff testified that the turbulence "lasted only 20 to 30 minutes and that he did get up when he was able to do so."[992] In its initial opinion, issued on July 10, 2007, the *Halterman* court granted Defendant's motion for summary judgment after applying the holding of the district court in *Margrave v. British Airways*,[993] and stated that "having to sit for long periods of times [sic] does not qualify as a Warsaw 'accident.'"[994] However, on October 12, 2007, the *Halterman* court issued an amended order in which this language was deleted, but the overall conclusion was not disturbed: Defendant Qantas' motion for summary judgment was still granted.[995]

b. In re Deep Vein Thrombosis Litigation:

On October 12, 2007, Judge Walker issued a decision addressing the summary judgment motions of the air carriers in the following Warsaw cases: *Dabulis v. Singapore Airlines, Inc.*, *Braha v. Delta Airlines, Inc.*, *Rietschel v. U.S. Airways, Inc.*, and *Bianchetti v. Delta Airlines, Inc.*.[996]

i. Dabulis v. Singapore Airlines, Inc.

Plaintiff was on an international flight from Singapore to New York, via Frankfurt, Germany.[997] Plaintiff was assigned to a "middle seat" on the flight, which she alleged had a metal bar di-

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990 *Id.* at *8.

991 *Id.* at *9–*10.

992 *Id.* at *10.

993 *See In re* Deep Vein Thrombosis Litig., No. 04-3953, 2007 WL 2029326, at *10 (N.D. Cal. Jul. 10, 2007) (quoting Margrave v. British Airways, 643 F. Supp. 510, 512 (S.D.N.Y. 1986) ("[E]xtended sitting in an airplane, even in an uncomfortable position, cannot properly be characterized as the sort of 'accident' that triggers an airline's liability under the Warsaw Convention.")).

994 *Id.*

995 *Compare In re Deep Vein Thrombosis Litig.*, 2007 WL 3010564, at *10, *12, *with In re Deep Vein Thrombosis Litig.*, 2007 WL 2029326, at *10, *13.

996 *In re* Deep Vein Thrombosis Litig., No. 04-1606 VRW, 2007 WL 3027351, at *1–*2 (N.D. Cal. Oct. 12, 2007).

997 *Id.* at *4.

rectly in front of her feet that restricted her leg room.[998] Plaintiff further alleged that she began experiencing pain in her left leg during the flight, which she blamed on her inability to adequately stretch her legs.[999] She asked a member of the flight crew to be moved to another seat, but was told that none were available.[1000] Later, another member of the flight crew informed Plaintiff that there was another seat available but that it did not recline, so Plaintiff chose to remain in her assigned seat.[1001] In fact, however, it was learned during discovery that other seats had been available on the flight.[1002] After the flight, her symptoms continued and she went to the hospital where she was diagnosed with DVT.[1003]

Defendant Singapore Airlines moved for summary judgment on the grounds that the alleged failure to reseat Plaintiff did not qualify as an "accident" under Article 17 of the Warsaw Convention or, alternatively, that Plaintiff's DVT was not caused by the Defendant's failure to reseat her.[1004] The district court relied primarily on two cases, *Husain v. Olympic Airways*,[1005] and *McCaskey v. Continental Airlines, Inc.*,[1006] in analyzing Defendant's motion.[1007] In *Husain*, the district court found that a flight attendant's refusal to reseat a passenger away from the smoking section, even though he was allergic to cigarette smoke, constituted an Article 17 "accident."[1008] In *McCaskey*, the district court "denied an airlines' motion for summary judgment finding genuine issues of material fact whether alleged rude behavior of airline staff, failure to divert the plane after a passenger suffered a stroke or improper training of flight crew for handling medical emergencies constituted an 'accident.'"[1009] In *Dabulis*, the district court denied Singapore's motion for summary judgment on the ground that "a reasonable jury could find" that the flight

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998 *Id.*

999 *See id.* at *4–*5.

1000 *Id.* at *5.

1001 *Id.*

1002 *Id.*

1003 *Id.*

1004 *See id.* at *2, *5.

1005 316 F.3d 829 (9th Cir. 2002).

1006 159 F. Supp. 2d 562 (S.D. Tex. 2001).

1007 *In re Deep Vein Thrombosis Litig.*, 2007 WL 3027351, at *6.

1008 *Id.* (citing Husain v. Olympic Airways, 116 F. Supp. 2d 1121, 1134 (N.D. Cal. 2000)).

1009 *Id.* (citing *McCaskey*, 159 F. Supp. at 574).

crew member's refusal to reseat Plaintiff constituted an Article 17 "accident" that caused her DVT.[1010]

ii. Braha v. Delta Airlines, Inc.

Plaintiff Gilberto Braha commenced an action on behalf of himself and his deceased wife, who died several days after traveling on an international flight from New York to Rome.[1011] Plaintiff alleged, *inter alia*, that his wife experienced an abnormal degree of turbulence on the flight, irregular altitude, inadequate air circulation and oxygenation, cramped seating, and that these conditions constituted an "accident" under Article 17 of the Warsaw Convention.[1012]

Defendant Delta Airlines moved for summary judgment on the ground that Plaintiff failed to submit virtually any evidence that the alleged conditions constituted an "accident" under Article 17, and the district court agreed.[1013] Additionally, the district court noted that even if Plaintiff had succeeded in establishing that an "accident" had occurred, there was no evidence that his wife's death was actually caused by DVT, or that she suffered from DVT during or after the flight.[1014] The district court thereby granted Delta's motion for summary judgment finding that Plaintiff had failed to adduce sufficient evidence to support his claims.[1015]

iii. Rietschel v. U.S. Airways, Inc.

In *Rietschel v. U.S. Airways, Inc.*, the district court clarified its ruling in *Halterman v. Qantas Airways*,[1016] where it stated that "having to sit for long periods of times [sic] does not qualify as a Warsaw 'accident.'"[1017] In *Rietschel*, Plaintiff traveled from San Francisco to Frankfurt via Philadelphia, and developed DVT after arriving in Germany.[1018] The flight from Philadelphia to Frankfurt was grounded for two hours before take-off due to bad weather, during which the passengers allegedly were told to

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[1010] *Id.* at *8.

[1011] *Id.*

[1012] *Id.* at *10.

[1013] *Id.*

[1014] *Id.* at *12.

[1015] *Id.* at *13.

[1016] *See In re* Deep Vein Thrombosis Litig., No. 04-3953, 2007 WL 2029326 (N.D. Cal. Jul. 10, 2007).

[1017] *In re Deep Vein Thrombosis Litig.*, 2007 WL 3027351, at *16 (quoting *In re Deep Vein Thrombosis Litig.*, 2007 WL 2029326, at *10).

[1018] *In re Deep Vein Thrombosis Litig.*, 2007 WL 3027351, at *13.

stay seated without being offered drinks.[1019] While the district court concluded that bad weather conditions or prolonged sitting alone should not be considered "an unusual or unexpected event," it stated that a reasonable jury could find that the events surrounding the delay and sitting, specifically the alleged two-hour confinement without the service of drinks, were unusual and unexpected constituting an "accident."[1020]

The district court noted that there are differences between: (1) "prolonged sitting that includes periods of mobility;" (2) "prolonged sitting that precludes any mobility due to safety risks such as turbulence or bomb threats;" and (3) "prolonged sitting . . . for no apparent reason."[1021] The district court stated that while the first two are not "unusual and unexpected" and, thus, would not be considered an Article 17 "accident:" "[w]holesale preclusion of recovery for injuries arising from cases in the third category would give airlines *carte blanche* to force passengers to remain seated without reason. This is untenable, and the court does not read those cases that address prolonged sitting to go so far."[1022]

In so ruling, the district court indicated that it would amend its opinion in *Halterman*,[1023] where it stated that prolonged sitting "does not qualify" as an Article 17 "accident." [1024] Instead, the district court offered the following clarification: "Forced prolonged sitting may qualify as an accident depending on the surrounding circumstances. But prolonged sitting does not become an accident simply because it is a 'link in the chain' of causation. This impermissibly conflates the accident inquiry with the causation inquiry."[1025] The district court thereby denied Defendant's motion for summary judgment.[1026]

[1019] *Id.*

[1020] *See id.* at *15–*16.

[1021] *Id.* at *16.

[1022] *Id.* (citing Margrave v. British Airways, 643 F. Supp. 510, 512 (S.D.N.Y. 1986); Scherer v. Pan Am. World Airways, Inc., 387 N.Y.S.2d 580, 581 (App. Div. 1976); Toteja v. British Airways, 1999 U.S. Dist LEXIS 17374 (D. Md. 1999)).

[1023] *In re* Deep Vein Thrombosis Litig., No. 04-3953, 2007 WL 2029326 (N.D. Cal. Jul. 10, 2007).

[1024] *In re Deep Vein Thrombosis Litig.*, 2007 WL 3027351, at *16.

[1025] *Id.*

[1026] *Id.* at *17.

iv. Bianchetti v. Delta Airlines, Inc.

In *Bianchetti v. Delta Airlines, Inc.*,[1027] Plaintiffs brought an action on behalf of a passenger who died after falling ill while flying from London to Atlanta.[1028] During the flight, the decedent experienced abnormal breathing, and one of the assisting passengers thought the decedent had a blood clot in her legs.[1029] The Captain of the aircraft received an emergency clearing to land in Atlanta.[1030] After the plane reached the gate, emergency paramedics boarded and attempted to treat Ms. Bianchetti.[1031]

Plaintiffs alleged three potential Article 17 "accidents": Delta Airlines' "alleged failures to (1) divert the plane [to the Cincinnati airport], (2) expedite care to [the decedent] upon landing in Atlanta, and (3) ensure that appropriate personnel able to provide the correct care met the flight."[1032] The district court rejected Plaintiffs' claim relating to the alleged failure to divert, finding that all the evidence indicated that continuing the flight to Atlanta created the shortest possible flight time.[1033]

The district court, however, found that the alleged failure to adequately respond to the decedent's illness could constitute an Article 17 "accident."[1034] The district court noted that there were several factual disputes regarding (1) whether the airline's failure to warn the paramedics that the decedent was suffering from DVT was an Article 17 "accident," or a causal factor in her death; (2) whether there was a delay by the airline in facilitating the paramedics' entry onboard following the landing; and (3) when the paramedics boarded the plane.[1035] Thus, the district court concluded that a reasonable jury could find that the airline's response to the decedent's condition constituted an Article 17 "accident" that contributed to her death and denied Defendant's motion for summary judgment.[1036]

[1027] *Id.* The decedent's husband and two sons were the Plaintiffs in *Bianchetti. Id.*

[1028] *Id.*

[1029] *Id.*

[1030] *Id.* at *18.

[1031] *Id.* at *19.

[1032] *Id.*

[1033] *Id.* at *20.

[1034] *Id.* at *20–*22.

[1035] *Id.* at *20–*21.

[1036] *Id.* at *22–*23.

c. In re Deep Vein Thrombosis Litigation: Vincent v. American Airlines, Inc.

In *Vincent v. American Airlines. Inc.*,[1037] the U.S. District Court for the Northern District of California addressed Plaintiff's claim that she developed DVT while traveling on Defendant American Airlines' flights from Madrid, Spain to Freeport, Bahamas, via Miami, Florida.[1038] Although Plaintiff's failure to warn claims previously had been dismissed, her allegation that an event or accident onboard her flight caused her to develop DVT remained.[1039] Specifically, Plaintiff alleged, *inter alia*, that after beginning to suffer pain and a swollen calf on her left leg during the first part of her flight, she was provided a seat on the second part of her flight that did not permit movement of her injured left leg, and that her request to change seats was denied by Defendant's flight attendant.[1040]

Defendant moved for summary judgment arguing that there was no unusual or unexpected event external to Plaintiff on her flights and, therefore, no Article 17 "accident."[1041] Plaintiff did not make any substantive arguments in her opposition to Defendant's motion, but rather, merely stated that she needed additional discovery in order to respond.[1042] In analyzing whether a denial of reseating for medical reasons could constitute an "accident," the district court cited to *Husain v. Olympic Airways*,[1043] where the district court held that a flight attendant's refusal to re-seat an allergic passenger away from the smoking section constituted an "accident" because it was in '"blatant disregard of industry standards and airline policies,' and therefore 'unexpected or unusual.'"[1044] Relying on *Husain*, the *Vincent* court denied Defendant's motion for summary judgment, finding that there were facts in dispute relating to the denial of Plaintiff's reseating request.[1045] However, the district court's denial was without prejudice as it further found that additional fac-

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1037 No. 04-1606 VRW, 2007 WL 3273553 (N.D. Cal. Oct. 31, 2007).

1038 *Id.* at *4.

1039 *Id.*

1040 *Id.* at *6.

1041 *Id.* at *2, *4.

1042 *Id.* at *5.

1043 316 F.3d 829 (9th Cir. 2002).

1044 *Vincent*, 2007 WL 3273553, at *7 (citing Husain v. Olympic Airways, 116 F. Supp. 2d 1121, 1134 (N.D. Cal. 2000)).

1045 *Id.*

tual development was warranted, and therefore permitted Plaintiff to pursue further discovery.[1046]

V. FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976

The U.S. Foreign Sovereign Immunities Act of 1976 ("FSIA")[1047] protects foreign governments, as well as their agencies, instrumentalities, and entities qualifying as an organ of a state, from suit in the United States.[1048] However, foreign governments can be sued if an exception applies.[1049] The exceptions all relate to the nature of the conduct for which the sovereign is being sued.[1050] A foreign government can be sued for its commercial acts, such as the buying or selling of products or services in the United States, or use in connection with military activity.[1051] The FSIA also excludes acts of terrorism and torture from immunity if committed by "an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency."[1052] A foreign government may also waive its sovereign immunity to suit in the United States "either explicitly or by implication."[1053]

A. VIVAS V. BOEING CO.

In *Vivas v. Boeing Co.*,[1054] the U.S. District Court for the Northern District of Illinois addressed whether Transporte Aereos Nacional de Selva, S.A. ("TANS"), a Peruvian airline, could be subject to lawsuit in the United States.[1055] *Vivas* involved tort cases arising out of the crash of an aircraft in Peru that was operated by TANS.[1056] Plaintiffs filed seven different complaints in the Circuit Court of Cook County against Defendants Boeing, United Technology Corporation, and TANS.[1057]

TANS filed a motion to dismiss arguing that it was immune from jurisdiction in the courts of the United States under the

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1046 *Id.*

1047 28 U.S.C. § 1602 (2000).

1048 28 U.S.C. §§ 1602–1604 (2000).

1049 28 U.S.C. § 1605 (2000 & Supp. 2005).

1050 *Id.*

1051 *Id.*

1052 28 U.S.C. § 1605(a)(7), *repealed by* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110–181, § 1083(b)(1)(A)(iii), 122 Stat. 341 (2008).

1053 *See* 28 U.S.C. § 1605(a)(1).

1054 No. 06 C 3566, 2007 WL 2409742 (N.D. Ill. Aug. 21, 2007).

1055 *Id.*

1056 *Id.*

1057 *Id.*

FSIA.[1058] The FSIA protects foreign governments, as well as their agencies, instrumentalities, and entities qualifying as an organ of a state, from suit in the United States.[1059] However, foreign governments can be sued if the plaintiff proves that an exception applies.[1060]

FSIA § 1603 defines "foreign state" as including "a political subdivision of a foreign state or an agency or instrumentality of a foreign state."[1061]

> "[A]gency or instrumentality of a foreign state" means any entity (1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof.[1062]

The district court noted that TANS was created as the state carrier of Peru pursuant to a Peruvian Supreme decree in 1963.[1063] TANS provided access to remote areas of Peru, served as the presidential aircraft fleet, and transported Peruvian troops as needed.[1064] All TANS' pilots also were required to be active duty Peruvian Air Force personnel.[1065] In 1999, the Peruvian government ordered all government entities holding shares in any companies on behalf of the Peruvian government to transfer them to an entity called FONAFE, which was charged with owning and managing all state owned enterprises.[1066] FONAFE, therefore, owned 100% of the shares of TANS.[1067] FONAFE appointed the TANS General Manager, and received all of TANS profits which it, in turn, transferred to the Peruvian Treasury.[1068] If TANS failed to generate sufficient revenue to operate, funds were provided by the state.[1069]

1058 *Id.* The district court previously had granted Plaintiffs' motion to remand for lack of federal question and diversity jurisdiction in the actions where TANS was not a Defendant. *Id.* The district court retained the actions where TANS was a Defendant to consider TANS' motion to dismiss. *Id.*

1059 28 U.S.C. §§ 1602–1604 (2000).

1060 *Id.*

1061 28 U.S.C. § 1603(a).

1062 28 U.S.C. § 1603(b).

1063 *Vivas*, 2007 WL 2409742, at *1.

1064 *Id.*

1065 *Id.*

1066 *Id.*

1067 *Id.*

1068 *Id.*

1069 *Id.*

It was undisputed that TANS was neither a foreign state nor a political subdivision of Peru.[1070] Therefore, TANS could qualify as a "foreign state" only if it was deemed an "agency or instrumentality" of a foreign state under § 1603(b).[1071]

In addressing TANS' motion, the district court examined the decision of the U.S. Supreme Court in *Dole Food Co. v. Patrickson.*[1072] In *Dole,* the Supreme Court found that a "corporation is an instrumentality of a foreign state under the FSIA only if the foreign state *itself* owns a majority of the corporation's shares."[1073] However, where the issue is whether the company could nevertheless qualify as an "agency or instrumentality" under the "organ-prong" of § 1603(b), there is no clear test and a court may therefore consider a number of factors relating to the creation, structure, and operation of the entity.[1074]

The *Vivas* court then addressed whether TANS was an organ of the State of Peru.[1075] The circumstances of TANS' creation and termination[1076] weighed heavily in favor of TANS being considered an organ of the State of Peru.[1077] The district court noted that TANS' role was similar to that of Air Force One of the United States.[1078] Additionally, TANS served the government's public purpose of transporting military personnel around the country, had little or no operational or financial autonomy, took orders directly from the Peruvian Government through FONAFE, and was financially inseparable from the Peruvian Government.[1079]

Although the district court also noted that TANS could contract in its own name, had agreed to be subject to all applicable laws with respect to its contractual obligations, and had agreed that it would not assert governmental immunity as a defense to its contractual obligations, the district court concluded that TANS had made a prima facie showing that it was an "organ" of the Peruvian state for purposes of the FSIA, and thereby an

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1070 *Id.* at *3.

1071 *Id.*

1072 *Id.* (citing Dole Food Co. v. Patrickson, 538 U.S. 468 (2003)).

1073 *Id.* (quoting *Dole,* 538 U.S. at 477).

1074 *Id.* at *4.

1075 *Id.* at *5.

1076 TANS was liquidated by means of a supreme decree on July 15, 2006. *Id.* at *2.

1077 *Id.* at *5.

1078 *Id.*

1079 *Id.*

"agency or instrumentality" for the purposes of § 1603(b).[1080] Because TANS had satisfied the requirements of § 1603(b) and Plaintiffs failed to prove that TANS was not entitled to immunity, the court held that TANS was immune from its jurisdiction, as well as from the jurisdiction of the Circuit Court of Cook County, and terminated the case.[1081]

B. COLELLA V. REPUBLIC OF ARGENTINA

In *Colella v. Republic of Argentina*,[1082] the U.S. District Court for the Northern District of California granted Defendant Argentina's motion for declaratory relief, finding that a foreign nation's presidential aircraft was immune from execution of a judgment that had been entered against the nation.[1083] Defendant Argentina had sought a ruling on whether bringing the aircraft to the United States for service and maintenance fit within the "used for commercial activity" exception under the FSIA.[1084] The district court found that the aircraft was employed strictly for transporting the nation's president in his official, rather than personal capacity, which it determined was a non-commercial purpose.[1085] The district court stated that "[i]t is plain that servicing and maintenance must be performed on the airplane for it to execute its sovereign functions safely. But such acts do not transform the 'use' of the plane into a commercial one."[1086] Moreover, because the aircraft carried the nation's commander-in-chief and was maintained and operated by military personnel, the aircraft was immune from execution of the judgment because it fell within FSIA's definition of "military property."[1087] The court thereby granted Defendant Argentina's motion, holding that the subject aircraft was immune from execution.[1088]

[1080] *Id.* The Court cited *Shirobokova v. CSA Czech Airlines, Inc.*, 335 F. Supp. 2d 989 (D. Minn. 2004), in which it was found that CSA, which had been continuously owned and operated by the Government of the Czech Republic, and which was 91% indirectly owned by the Government, qualified as an "organ" of the state. *Id.*

[1081] *Id.* at *6–*7.

[1082] No. C 07-80084 WHA, 2007 WL 1545204 (N.D. Cal. May 29, 2007).

[1083] *Id.* at *1.

[1084] *Id.* at *4.

[1085] *Id.* at *6

[1086] *Id.* at *7.

[1087] *Id.*

[1088] *Id.* at *8.

C. GUPTA V. THAI AIRWAYS INTERNATIONAL, LTD.

In *Gupta v. Thai Airways International, Ltd.*,[1089] Thai Airways appealed the U.S. District Court for the Central District of California's denial of its motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.[1090] Plaintiff had filed a complaint in California Superior Court, alleging that Thai Airways' employees improperly refused to allow him to board an aircraft for a flight from Bangkok to Los Angeles, and "subjected him to unwarranted accusations of fraud."[1091] He claimed that, because he was unable to fly to Los Angeles, he missed a "lucrative business meeting."[1092] The airline successfully moved to dismiss the action for lack of subject matter jurisdiction with the court finding that Thai Airways was a "foreign state" under the FSIA and that Plaintiff had failed to allege that any exception applied.[1093]

Thereafter, rather than appealing the state court order, Plaintiff filed a complaint in federal district court alleging the same causes of action.[1094] Defendant Thai Airways moved to dismiss under, *inter alia*, Rule 12(b)(1) of the Federal Rules of Civil Procedure arguing that "the issue of subject matter jurisdiction and immunity under the FSIA was *res judicata* by virtue of the state court's prior determination of these issues."[1095] The district court denied Defendant's motion and Defendant thereafter appealed.[1096] The U.S. Court of Appeals for the Ninth Circuit found that the California state court order of dismissal was final and because it had not been appealed, the decision had a preclusive effect in federal court.[1097] The Ninth Circuit noted that Plaintiff had had a "full and fair opportunity" to establish jurisdiction, and having failed to do so, "[h]e does not now get a do-over."[1098] The Ninth Circuit, therefore, reversed the district court judgment and remanded the case with instructions to vacate the order and dismiss for lack of jurisdiction.[1099]

1089 487 F.3d 759 (9th Cir. 2007).
1090 *Id.* at 760.
1091 *Id.* at 761.
1092 *Id.*
1093 *Id.* at 767.
1094 *Id.* at 762.
1095 *Id.*
1096 *See id.* at 763.
1097 *Id.* at 767.
1098 *Id.*
1099 *Id.*

D. BOEING CO. V. EGYPTAIR

In *Boeing Co. v. EgyptAir*,[1100] the U.S. Court of Appeals for the Second Circuit discussed whether the district court had jurisdiction over an Egyptian government-owned insurance company acting as subrogee for the carrier.[1101] The appeal related to the crash of EgyptAir Flight 990 near Nantucket Island, Massachusetts, on October 31, 1999.[1102]

Plaintiff Boeing commenced a declaratory judgment action within the U.S. District Court for the Eastern District of New York against Defendants EgyptAir and Misr Insurance, EgyptAir's insurer, which was wholly owned by the government of Egypt, and Misr's reinsurers.[1103] Prior to the commencement of Boeing's action, Misr had commenced a subrogation action against Boeing in an Egyptian court.[1104] In *Nantucket Island*, Boeing sought a declaratory judgment that EgyptAir, Misr, and Misr's reinsurers were barred by contract from recovering damages from Boeing relating to the crash of the subject flight or, alternatively, that EgyptAir was liable to Boeing for the subrogation damages.[1105] Defendant Misr moved to dismiss Boeing's action for lack of subject matter jurisdiction under the FSIA and for lack of "minimum contacts" necessary for the district court to exercise personal jurisdiction over Misr.[1106] Defendant Misr also later moved to dismiss under the Declaratory Judgment Act.[1107]

The district court denied Misr's motions to dismiss.[1108] Defendant Misr pursued an interlocutory appeal of the district court's denial of its motions to dismiss.[1109] The Second Circuit addressed Misr's arguments relating to the FSIA and lack of per-

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[1100] No. 05-5986-CV, 2007 WL 1315716 (2d Cir. May 7, 2007).

[1101] *See id.* at *1–*2.

[1102] The appellate court indicated that they assumed "the parties' familiarity with the facts and procedural history of the case," and cited to the district court opinion rather than reciting the facts and procedural history. *Id.* at *1 (citing *In re* Air Crash Near Nantucket Island, Mass., on Oct. 31, 1999, 392 F. Supp. 2d 461 (E.D.N.Y. 2005) [hereinafter *Nantucket Island*]).

[1103] *Nantucket Island*, 392 F. Supp. 2d at 464–65.

[1104] *Id.* at 464.

[1105] *Id.*

[1106] *Id.*

[1107] *Id.*

[1108] *Id.*

[1109] Boeing Co. v. EgyptAir, No. 05-5986-CV, 2007 WL 1315716, at *1 (2d Cir. May 7, 2007).

sonal jurisdiction, but declined to review the district court's decision regarding the Declaratory Judgment Act.[1110]

With respect to Plaintiff's argument relating to the FSIA, the Second Circuit noted that Misr had named Boeing as an additional insured under EgyptAir's hull and liability insurance policy, which was central to Boeing's claim for declaratory relief because Boeing asserted that its status as a named insured precluded Misr from recovering from Boeing the damages it had paid relating to the Flight 990 crash.[1111] Thus, the Second Circuit found that there was a "'significant nexus' between Boeing's claims and Misr's commercial activity" and, as such, the district court had properly relied upon the commercial activity exception under the FSIA.[1112]

Further, because Misr had no rights against Boeing that were not based on its subrogee-subrogor relationship with EgyptAir, a relationship that was created by the subject insurance policy and was limited by EgyptAir's contracts with Boeing, Boeing's claims against Misr were determined to be "'based upon' the insurance policy."[1113] Accordingly, the district court properly denied Misr's motion with respect to its claim of sovereign immunity.[1114]

The Second Circuit then rejected Plaintiff's argument that there were insufficient minimum contacts to establish personal jurisdiction.[1115] The Second Circuit found that there were sufficient minimum contacts because: (1) "Boeing's claims [arose] out of Misr's contact with the United States;" (2) Misr purposefully conducted commercial activity within the United States by naming Boeing as an additional insured on EgyptAir's policies

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[1110] *Id.* at *1–*2. The Second Circuit found that it had jurisdiction to review the appeal relating to the lack of subject matter jurisdiction under the FSIA based upon the collateral order exception to the final judgment rule. *Id.* at *1. It also exercised pendent appellate jurisdiction relating to the issue of lack of personal jurisdiction because the issues relating to minimum contacts for personal jurisdiction purposes and commercial contacts for FSIA purposes were "inextricably intertwined." *Id.* at *2. However, the Second Circuit declined to review the district court's decision as it related to the Declaratory Judgment Act because the issues relating to jurisdiction under the Declaratory Judgment Act and FSIA immunity were not sufficiently "intertwined." *Id.* Accordingly, the Second Circuit addressed the appeal of the FSIA and personal jurisdiction issues, but dismissed the appeal relating to the Declaratory Judgment Act. *Id.* at *3.

[1111] *Id.* at *1.

[1112] *Id.*

[1113] *Id.* at *2.

[1114] *Id.*

[1115] *Id.*

and insuring its flights to and from the United States; and (3) Boeing is a U.S. corporation and, thus, the "United States [had] a substantial interest in adjudicating this dispute . . . and two of the agreements central to Boeing's claims are governed by, and . . . require[d] application of, U.S. law."[1116] Accordingly, the Second Circuit affirmed the district court's denial of Defendant Misr's motion to dismiss relating to lack of subject matter and personal jurisdiction.[1117]

VI. THE GENERAL AVIATION REVITALIZATION ACT OF 1994

The General Aviation Revitalization Act of 1994 ("GARA")[1118] established a "statute of repose to protect general aviation manufacturers from long-term liability in those instances where a particular aircraft has been in operation for a considerable number of years."[1119] Subject to certain exceptions set forth below, GARA protects manufacturers of general aviation aircraft, and manufacturers of any new component, system, subassembly, or other part of the aircraft.[1120] The statute of repose period is eighteen years beginning on the date of delivery of the aircraft or component part to its first purchaser, lessee, or to a person engaged in the business of selling or leasing such aircraft.[1121] GARA also provides for a "rolling" statute of repose that begins to run from the date of completion of replacement or addition of a component that causes an accident.[1122] The new eighteen-year time period is triggered by the replacement of a component and applies "*only* to the entity that manufactured the replacement part," not to the manufacturer of the aircraft, "for a part installed subsequent to delivery in the event of a crash attributable to a structural defect or similar flaw in a new component part."[1123]

There are limited exceptions to the application of GARA. Those exceptions are: (1) where "the claimant pleads with speci-

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[1116] *Id.*

[1117] *Id.* at *3.

[1118] 49 U.S.C. § 40101 (2000).

[1119] Altseimer v. Bell Helicopter Textron Inc., 919 F. Supp. 340, 342 (E.D. Cal. 1996).

[1120] *See* 49 U.S.C § 40101(2)(a).

[1121] *Id.* at §§ 40101 (2)(a), (3)(3).

[1122] *Id.* at § 40101 (2)(a)(2).

[1123] Campbell v. Parker-Hannifin Corp., 82 Cal. Rptr. 2d 202, 209 (Ct. App. 1999) (emphasis added); *see* Pridgen v. Parker Hannifin Corp., 905 A.2d 422, 424 (Pa. 2006).

ficity the facts necessary to prove . . . that the manufacturer . . . knowingly misrepresented . . . or concealed or withheld from the Federal Aviation Administration ("FAA"), required information that is material and relevant" to the maintenance or operation of the aircraft or component part, and that such misrepresentation, concealment, or withholding caused the accident; (2) where the claim is being made for a person who was a passenger for the "purposes of receiving treatment for a medical or other emergency" (*e.g.*, a medical evacuation by helicopter from the scene of an automobile accident); (3) where the injured person "was not onboard the aircraft at the time of the accident" (*e.g.*, an individual on the ground who was hit by the aircraft or debris); and (4) where the action is "brought under a written warranty enforceable under law but for the operation of [GARA]."[1124]

A. PRIDGEN V. PARKER HANNIFIN CORP.

The language of the GARA statute does not provide a definition of "manufacturer." However, courts have recently addressed whether the definition of "manufacturer" extends beyond the entity that manufactured the aircraft or component part to other successor entities that take over manufacturing duties for the original manufacturer by obtaining an FAA type certificate.[1125]

In *Pridgen v. Parker Hannifin Corp.*,[1126] Plaintiffs brought product liability claims against the original aircraft engine manufacturer where more than eighteen years had elapsed between the date of engine installation and the date of the accident.[1127] To avoid GARA's statute of repose, Plaintiffs argued that the period of exposure had begun anew for Textron Inc., the engine manufacturer, when defective replacement parts were added to the engine within eighteen years of the accident, despite the fact that these parts were not actually supplied by Textron.[1128]

[1124] 49 U.S.C § 40101(2)(b).

[1125] A Type Certificate represents FAA approval of a basic aircraft design and is issued to a manufacturer who intends to produce a new type of aircraft. *See generally* 14 C.F.R. §§ 21.11–21.55 (2006). A Type Certificate indicates that the aircraft design comports with minimum safety standards. *Id.* To obtain a Type Certificate, the applicant must submit designs, drawings, test reports, and computations necessary to show that the aircraft meets FAA regulations. *Id.*

[1126] 905 A.2d 422 (Pa. 2006).

[1127] *Id.* at 425.

[1128] *Id.*

The Pennsylvania Supreme Court addressed whether GARA's rolling provision removed a manufacturer from the protection of the statute of repose merely due to its status as the original manufacturer of the aircraft engine.[1129] The Court of Common Pleas drew a distinction between liability asserted against a manufacturer "in its capacity as manufacturer," which would be protected by GARA's repose period, and liability asserted in its capacity as a designer or type certificate holder, which the Court of Common Pleas believed would not be subject to GARA.[1130] The Pennsylvania Supreme Court disagreed, concluding that a type certificate holder qualified as a "manufacturer" for purposes of GARA because the duties and responsibilities arising out of the type certification process should logically be considered to be asserted against the manufacturer "in its capacity as a manufacturer" under GARA.[1131]

The Pennsylvania Supreme Court further found, however, that status as a type certificate holder in and of itself would not be sufficient to implicate GARA's rolling provision where a defendant did not actually manufacture the relevant replacement part.[1132] The Supreme Court explained that GARA's rolling provision only applies to the entity that manufactured or supplied the replacement part, and that GARA's rolling provision is not triggered by the status of original aircraft manufacturer, type certificate holder, or designer alone.[1133] Therefore, the original engine manufacturer was protected by the original eighteen-year period of repose from the initial sale date, and the replacement part manufacturer was subject to the rolling provision that began the eighteen-year period anew when the new component was installed.[1134]

B. HASLER AVIATION, L.L.C. V. AIRCENTER, INC.

In *Hasler Aviation, L.L.C. v. Aircenter, Inc.*,[1135] the U.S. District Court for the Eastern District of Tennessee addressed whether a type certificate holder is a "manufacturer" for purposes of GARA. In this case, Plaintiff Hasler Aviation purchased a 1962 Aero Commander Model 500A from Aircenter, Inc. which in-

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[1129] *Id.* at 434–35.
[1130] *Id.* at 434.
[1131] *Id.* at 435.
[1132] *Id.* at 436.
[1133] *Id.*
[1134] *Id.* at 437.
[1135] No. 1:06-CV-180, 2007 WL 2263171 (E.D. Tenn. Aug. 3, 2007).

cluded an upgrade package quoted by Aircenter and its proprietor, Gary Gadberry.[1136] After the aircraft was delivered in December 2004, "Plaintiff noticed, and Gadberry admitted, the aircraft was defective and was not airworthy."[1137] One of the chief defects related to wing spar corrosion.[1138] Though Plaintiff suffered no personal injury or property damage, it paid over $250,000 for an aircraft that was unsafe to fly.[1139] Plaintiff sued Aircenter, Gadberry, and their related entities for alleged breach of contract, breach of warranty, fraud and negligent misrepresentation, and violation of the state consumer protection law.[1140]

Plaintiff also sued Twin Commander, the airplane manufacturer, as the "type certificate holder" for the aircraft.[1141] Plaintiff claimed that "Twin Commander knew its Model 500A aircraft had issues with wing spar corrosion and Twin Commander was negligent *per se* in failing to notify the FAA or issue a 'Service Bulletin'"[1142] relating to the corrosion problems.[1143] Twin Commander filed a motion for judgment on the pleadings, arguing that the economic loss doctrine precluded Plaintiffs' product liability claim because it suffered no personal injury or damage to property.[1144]

In deciding Twin Commander's motion, the district court addressed whether a type certificate holder also must be a manufacturer.[1145] Plaintiff asserted that Twin Commander had a duty to inform it that the aircraft was not airworthy based on its status as the aircraft's type certificate holder, rather than its duty as a manufacturer.[1146] In considering this assertion, the district court reviewed the GARA cases that had addressed the question of when a successor corporation is defined as an aircraft's manufacturer, including *Pridgen v. Parker Hannifin Corp.*,[1147] *Burroughs*

[1136] *Id.* at *1.

[1137] *Id.*

[1138] *Id.*

[1139] *Id.*

[1140] *Id.*

[1141] *Id.*

[1142] A Service Bulletin contains a recommendation from a manufacturer which it believes the aircraft owner should comply with and generally concerns a safety of flight issue requiring inspection, component replacement, or maintenance.

[1143] *Hasler Aviation*, 2007 WL 2263171, at *1.

[1144] *Id.* at *2.

[1145] *Id.* at *3.

[1146] *Id.*

[1147] 905 A.2d 422 (Pa. 2006).

v. Precision Airmotive Corp.,[1148] *Mason v. Schweizer Aircraft Corp.*,[1149] and *Sheesley v. Cessna Aircraft Co.*[1150] The district court noted that those courts had concluded that the holder of a type certificate is deemed to be the manufacturer as well.[1151] It agreed with this conclusion, stating:

> Therefore, this Court agrees with the reasoning of the above cases: the FAA grants a type certificate to the manufacturer, and any action against a type certificate holder is really against the manufacturer. The existence of supplemental type certificates, which may be obtained by those who are not the original manufacturers/type certificate holders in order to build upon a prior design, and the fact a type certificate may be licensed to another producer, support this and other courts' interpretation of the FAA regulations.[1152]

The district court ultimately granted Twin Commander's motion on the ground that, because Plaintiff's complaint was brought against Twin Commander as a manufacturer, the economic loss doctrine barred any recovery since the Plaintiff suffered neither injury nor property damage.[1153]

C. ZAHORA V. PRECISION AIRMOTIVE CORP.

In *Zahora v. Precision Airmotive Corp.*,[1154] the U.S. District Court for the Eastern District of Pennsylvania discussed GARA in the context of federal question jurisdiction.[1155] Defendants, an aircraft engine maker and an aircraft repair company, removed the suit to federal court when Plaintiffs filed state law claims in Pennsylvania state court.[1156] In determining whether the case was properly before it, the district court considered whether federal regulation of aviation safety preempts state law in such a way that it creates a federal question to confer federal jurisdiction as set forth by the Supreme Court in *Grable & Sons Metal Products v. Darue Engineering & Manufacturing*.[1157]

In *Grable*, the Supreme Court held that a state law claim could contain a federal question of sufficient importance to confer ju-

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[1148] 93 Cal. Rptr. 2d 124 (Ct. App. 2000).
[1149] 653 N.W.2d 543 (Iowa 2002).
[1150] No. Civ. 02-4185-KES, 2006 WL 1084103 (D.S.D. Apr. 20, 2006).
[1151] *Hasler Aviation*, 2007 WL 2263171, at *3–*4.
[1152] *Id.* at *5 (citations omitted).
[1153] *Id.* at *7.
[1154] No. 06-CV-3520, 2007 WL 765024 (E.D. Pa. Mar. 9, 2007).
[1155] *Id.* at *1.
[1156] *Id.*
[1157] 545 U.S. 308 (2005); *Zahora*, 2007 WL 765024, at *1.

risdiction on a district court.[1158] Relying on *Grable*, Defendants argued that federal jurisdiction was appropriate because Plaintiffs' claim that fuel injector defects rendered the aircraft engines not airworthy implicated a significant federal interest.[1159] Specifically, Defendants argued that federal jurisdiction existed because they would assert their compliance with FAA regulations and GARA, a federal statute, as a defense.[1160]

The district court, however, rejected Defendants' argument, finding that under the well-pleaded complaint rule, which provides that jurisdiction conferring elements must exist in the complaint, rather than the answer, Plaintiffs' claims did not present a federal question.[1161] The district court noted that the facts of *Grable* presented a "special and small category" of cases involving a nearly pure issue of law, in sharp contrast to the fact-bound inquiry that exists in aviation litigation.[1162] The district court concluded that exercising jurisdiction over this matter would risk a flood of state claims to federal court simply because they contain embedded federal issues.[1163] Accordingly, the district court remanded the case to state court.[1164]

D. Robinson v. Hartzell Propeller Inc.

Plaintiffs in recent years have been attempting to skirt GARA by invoking the "knowing misrepresentation, or concealment, or withholding" exception.[1165] To take advantage of this exception, a plaintiff must demonstrate a "(1) knowing misrepresentation, or concealment, or withholding; (2) of required information that is material and relevant; (3) that is causally related to the harm they suffered."[1166] Those defendant manufacturers moving for summary judgment will often face an uphill battle in establishing that no issues of fact exist as to each of these elements. Courts often will let these issues go to trial, even where the defendant has developed considerable evidence in an attempt to refute the plaintiff's allegations on these issues. For example, in *Robinson v. Hartzell Propeller Inc.*, the U.S. District

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1158 *Id.*
1159 *Id.*
1160 *Id.*
1161 *Id.*
1162 *Id.* at *2.
1163 *Id.*
1164 *Id.*
1165 Robinson v. Hartzell Propeller Inc., 326 F. Supp. 2d 631, 646 (E.D. Pa. 2004).
1166 *Id.*

Court for the Eastern District of Pennsylvania denied Hartzell Propeller Inc.'s motion for summary judgment where Plaintiffs asserted GARA's "knowing misrepresentation or concealment or withholding" exception.[1167] The case arose out of a crash of a Mooney M20E aircraft in which Plaintiffs were physically injured.[1168] Plaintiffs alleged that a blade of the aluminum propeller on their aircraft fractured during the flight, causing the crash.[1169]

The district court denied Hartzell's initial motion for summary judgment, holding that there were genuine issues of material fact as to several instances of "knowing misrepresentation or concealment or withholding" by Hartzell.[1170] According to the district court, there were two instances of "knowing misrepresentation" involving engineering reports that Hartzell submitted to the FAA in its application for a type certificate for the accident propeller.[1171] Additionally, the district court found that Plaintiffs raised genuine issues of material fact on the issue of whether Hartzell misrepresented results of vibration tests conducted on the accident propeller, and whether it had knowingly misrepresented the actual cause of propeller failures after certification.[1172]

After the U.S. Court of Appeals for the Third Circuit dismissed Hartzell's interlocutory appeal of the district court's opinion,[1173] Hartzell renewed its motion for summary judgment.[1174] Hartzell presented additional evidence obtained in subsequent discovery and argued that no issue of material fact remained whether Hartzell misrepresented, concealed, or withheld material information that caused the accident.[1175] The additional evidence presented by Hartzell included letters from the FAA, affidavits from experts, and internal manufacturing documents relating to tests performed on the accident propeller and certification issues.[1176] In denying Hartzell's renewed motion, the district court reviewed the additional discovery and

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[1167] *Id.* at 635.

[1168] *Id.* at 636.

[1169] *Id.*

[1170] *See id.* at 631.

[1171] *See id.* at 649–51.

[1172] *Id.* at 649–50, 653–58.

[1173] Robinson v. Hartzell Propeller Inc., 454 F.3d 163 (3d Cir. 2006).

[1174] Robinson v. Hartzell Propeller Inc., No. 01-5240, 2007 WL 2007969, at *1 (E.D. Pa. 2007).

[1175] *Id.* at *4.

[1176] *See id.* at *4–*7.

concluded that the new evidence did not resolve any of the issues it had previously identified, but rather raised additional questions of fact.[1177]

E. COLGAN AIR, INC. V. RAYTHEON AIRCRAFT CO.

Plaintiffs sometimes argue that manuals—often flight manuals—could be considered "part of the aircraft," thereby restarting GARA's rolling statute of repose if the manual itself was replaced within eighteen years of an accident.[1178] While the decision of the U.S. Court of Appeals for the Fourth Circuit in *Colgan Air, Inc. v. Raytheon Aircraft Co.*[1179] does not address GARA, it includes an important discussion about whether a maintenance manual can be considered "part of the aircraft." In *Colgan*, Plaintiff Colgan Air, Inc. sued Raytheon Aircraft Co. after the aircraft that it leased from Raytheon's parent company crashed, resulting in the death of the pilot and co-pilot.[1180] Colgan claimed negligence, strict liability, and breach of express and implied warranties.[1181] It alleged that several errors in the maintenance manual for the aircraft caused the crash.[1182]

The U.S. District Court for the Eastern District of Virginia had found that all claims by Colgan against Raytheon were barred by the Used Airliner Airplane Warranty executed by Colgan as part of its lease of the aircraft.[1183] The district court proceeded on the notion that defects in the maintenance manual existed and concluded that the manual was "part of the Aircraft" and therefore was governed by the terms of the warranty agreement.[1184] Consequently, the district court found that, "Colgan had no warranty rights against Raytheon except the ninety-day limited war-

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[1177] *See id.* at *7–*10.

[1178] *See, e.g.*, Caldwell v. Enstrom Helicopter Corp., 230 F.3d 1155, 1156–57 (9th Cir. 2000) (plaintiffs alleged that helicopter flight manual was part of aircraft for purposes of GARA and that manual, replaced within eighteen years of accident, caused the accident); Robinson v. Hartzell Propeller, Inc., 326 F. Supp. 2d 631, 662 (E.D. Pa. 2004) (rejecting plaintiffs' argument that overhaul manual should be considered a "new part" for purposes of GARA); Carolina Indus. Prods., Inc. v. Learjet, Inc., 189 F. Supp. 2d 1147, 1170 (D. Kan. 2001) (rejecting plaintiffs' argument that maintenance and flight manual should restart GARA because plaintiffs argued they were defective).

[1179] 507 F.3d 270 (4th Cir. 2007).

[1180] *Id.* at 271.

[1181] *Id.*

[1182] *See id.* at 273–74.

[1183] *Id.* at 274.

[1184] *Id.*

ranty, which had expired by the time of the crash."[1185] In an alternative ruling, the district court rejected Colgan's argument that the manual's language constituted an express warranty, also concluding that Massachusetts law did not permit Colgan's claim for strict liability.[1186]

The district court ruled that the maintenance manual was "part of the Aircraft" for several reasons.[1187] First, the district court relied on several cases that found that a flight manual is not a separate product from the aircraft, including *Alexander v. Beech Aircraft Corp.*[1188] and *Caldwell v. Enstrom Helicopter Corp.*[1189] In *Alexander*, the U.S. Court of Appeals for the Tenth Circuit found that a replacement flight manual was not a separate product for purposes of the Indiana Products Liability Act and the statute of repose.[1190] In *Caldwell*, the Ninth Circuit held that a flight manual is "part" of a helicopter that does not restart the applicable statute of repose for purposes of GARA.[1191]

Second, the district court concluded that the Federal Aviation Regulations ("FARs") support treating a maintenance manual and the aircraft as a single, integrated product because, under the court's interpretation of the FARs, "an aircraft's maintenance manual is essential to maintaining an aircraft's airworthiness" under the FARs.[1192] Finally, the district court concluded that the fact that Colgan may have purchased the maintenance manual in a separate transaction was immaterial to its determination that a maintenance manual and an aircraft are a single product.[1193]

Colgan appealed the district court's ruling, arguing that it erred in concluding that the maintenance manual was "part of the Aircraft."[1194] The Fourth Circuit agreed.[1195] The Fourth Circuit distinguished the cases cited by the lower court because nearly all of those cases considered whether a supplement to a flight manual, which failed to include a warning relating to defects in the aircraft, constituted a continuing failure to warn and

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1185 *Id.*
1186 *Id.*
1187 *Id.*
1188 952 F.2d 1215 (10th Cir. 1991).
1189 230 F.3d 1155 (9th Cir. 2000).
1190 *Alexander*, 952 F.2d at 1220–21.
1191 *Caldwell*, 230 F.3d at 1157.
1192 *Colgan*, 507 F.3d at 277.
1193 *Id.* at 275.
1194 *Id.*
1195 *Id.* at 278.

could restart the statute of repose for limitations purposes.[1196] As the Fourth Circuit noted, "[n]one of the cases relied on by the district court presented facts where the defect existed in the flight manual alone."[1197] In this case, Colgan had made no allegation that the aircraft itself was defective, nor did it allege that Raytheon had a duty to warn in order to restart a statute of repose.[1198]

Moreover, the cases cited by the district court, including *Alexander* and *Caldwell*, involved flight manuals, whereas this case involved a maintenance manual.[1199] The Fourth Circuit opined that flight manuals were not sufficiently similar to maintenance manuals because, "[a] flight manual is used by the pilot and is 'necessary to operate the aircraft,' whereas a maintenance manual 'outline[s] procedures for the troubleshooting and repair of the aircraft' for the mechanic."[1200] Moreover, the FARs require flight manuals to be onboard the aircraft at all times, whereas no federal regulations exist requiring a maintenance manual to be onboard the aircraft.[1201] The Fourth Circuit therefore concluded that the district court's reliance on the case authority involving flight manuals was misplaced.[1202]

The Fourth Circuit also disagreed with the district court's conclusion that under the FARs a maintenance manual and the aircraft are a single, integrated product.[1203] The Fourth Circuit concluded that a maintenance manual was not "essential" to maintaining an aircraft's airworthiness under the FARs because the regulations allow for other means of compliance.[1204] In addition, the Fourth Circuit found that genuine issues of material fact existed, including whether Colgan obtained the maintenance manual from Raytheon in connection with the lease

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1196 *Id.* at 276 (citing Schamel v. Textron-Lycoming, 1 F.3d 655, 657 (7th Cir. 1993) (affirming district court's dismissal of action for failure to warn of defective condition in engine of aircraft as being barred by the statute of repose); Alexander v. Beech Aircraft Corp., 952 F.2d 1215, 1222 (10th Cir. 1991) (rejecting plaintiffs' argument that operator manual/handbook was replacement part for purposes of statute of repose; holding the instruction page was not a separate product so as to recommence the running of the statute of repose)).

1197 *Id.*

1198 *Id.*

1199 *Id.*

1200 *Id.* (citing Caldwell v. Enstrom Helicopter Corp., 230 F.3d 1155, 1157 (9th Cir. 2000)).

1201 *Id.* at 277.

1202 *Id.*

1203 *Id.*

1204 *Id.*

agreement, and other documents related to the Used Airliner Warranty.[1205] This fact was relevant to the Fourth Circuit because it bore directly on whether the parties actually intended and considered the maintenance manual to be "part of the Aircraft" instead of an individual product to be acquired via a separate transaction.[1206] Accordingly, the judgment of the district court with respect to the maintenance manual was vacated and the case was remanded.[1207]

VII. 9/11 LITIGATION

Litigation relating to the September 11, 2001 terrorist attacks continues to assess potential liabilities flowing from the events of that day. Several of the opinions addressed below illustrate the complexity of the legal issues involved in the 9/11 litigation, and the reasons why this litigation will not be resolved any time soon.[1208]

A. IN RE WORLD TRADE CENTER DISASTER SITE LITIGATION

Soon after the September 11 terrorist attacks, Congress enacted the Air Transportation Safety and System Stabilization Act ("ATSSSA"),[1209] which, *inter alia*, conferred "original and exclusive jurisdiction" for all September 11-related actions upon the U.S. District Court for the Southern District of New York.[1210] The extent to which the ATSSSA preempts state law claims for injuries arising out of the events of September 11 has been the topic of much dispute.[1211] In dictum, the U.S. Court of Appeals for the Second Circuit indicated that the ATSSSA "made the claims of workers alleging respiratory injuries exclusively federal."[1212] In *In re WTC Disaster Site Litigation I*, the district court

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[1205] *Id.*

[1206] *Id.* at 278.

[1207] *Id.* at 280–81.

[1208] *See* United States v. Moussaoui, 483 F.3d 220, 225 (4th Cir. 2007); *In re* Sept. 11th Litig., No. 21 MC 97(AKH), 2007 WL 1965559, at *1 (S.D.N.Y. July 5, 2007).

[1209] 49 U.S.C.A. § 40101 (2008).

[1210] *Id.* at §§ 40101 (48)(a), (b)(3).

[1211] *See In re* World Trade Ctr. Disaster Site Litig., 467 F. Supp. 2d 372, 373 (S.D.N.Y. 2006) [hereinafter *WTC Disaster Site Litig. I*] ("The scope of this Court's jurisdiction under the ATSSSA has been an issue of contention in a variety of cases where plaintiffs suffered injuries at the WTC site after September 11, 2001.").

[1212] *Id.* at 373 (citing *In re* WTC Disaster Site, 414 F.3d 352, 371 (2d Cir. 2005) [hereinafter *WTC Disaster Site Litig. II*]).

adopted this dictum and held that the ATSSSA's preemptive effect "applies equally to other types of injuries allegedly suffered in the clean-up of the World Trade Center site, including injuries suffered at the Fresh Kills Landfill site on Staten Island."[1213]

The district court's decision in *In re WTC Disaster Site Litigation I* addressed several Plaintiffs' motions to remand to state court certain claims filed by workers involved in the WTC Disaster Site clean-up for non-respiratory personal injuries pursuant to state law.[1214] Initially filed in New York State Supreme Court, the cases were removed to the Southern District as related to cases already pending before the court.[1215] In the related litigation, workers who had participated in the clean-up of the World Trade Center site had filed actions seeking to recover damages for respiratory injuries, claiming that the defendants in the actions had failed to provide adequate safety measures for the workers engaged in the clean-up operations.[1216] In *In re WTC Disaster Site Litigation I*, the district court held that it had original and exclusive jurisdiction over both the respiratory and non-respiratory personal injury claims under the ATSSSA, because:

> Plaintiffs alleging non-respiratory injuries, like those suffering respiratory injuries, raise common issues of law or fact concerning the events of September 11, 2001. Plaintiffs name common defendants in their claims, on common theories of negligence and recovery that require each plaintiff to establish the same or similar facts. In particular, like the respiratory-injury plaintiffs, non-respiratory-injury plaintiffs allege that parties responsible for maintaining a safe workplace negligently failed to do so. . . . Since some of these elements may be susceptible to multiple interpretations and varying adjudications if litigated in different courts, they present a risk that Congress sought to avoid by enacting the ATSSSA.[1217]

[1213] *Id.*

[1214] *Id.* at 372–73.

[1215] *Id.* at 373.

[1216] *Id.* at 374. Certain defendants in the respiratory actions already before the court had previously moved to dismiss the claims against them on the grounds of statutory immunity. *Id.* at 373. The Southern District deferred ruling on Plaintiffs' motions to remand the non-respiratory personal injury claims until after deciding the motion to dismiss on immunity grounds. *Id.* After ruling on the motion to dismiss, the Southern District found that Plaintiffs' motions to remand the non-respiratory personal injury claims were ripe for decision. *Id.*

[1217] *Id.* at 374.

Accordingly, because the Southern District found that it had exclusive jurisdiction over the claims under the ATSSSA, Plaintiffs' motions to remand were denied.[1218]

B. In re World Trade Center Disaster Site Litigation

There has been considerable debate about the proper scope of jurisdiction under the ATSSSA, especially over claims for respiratory and other personal injuries brought by workers involved in the clean-up of the World Trade Center. In October 2006, the U.S. District Court for the Southern District of New York denied the motions of Defendants in the respiratory cases for judgment on the pleadings and dismissal on immunity grounds.[1219] Defendants requested that the district court certify an interlocutory appeal under 28 U.S.C. § 1292(b).[1220] The next day, Defendants filed a notice of appeal and claimed the order was immediately appealable as of right pursuant to 28 U.S.C. § 1291 and the collateral order doctrine, and that the appeal divested the district court of jurisdiction.[1221]

The district court thereafter denied Defendants' motion for certification, disagreed that the notice of appeal effectively divested it of jurisdiction, and rejected Defendants' attempt to invoke the collateral order doctrine.[1222] In examining the collateral order doctrine, the district court explained that, as controlling precedent made clear, "the denial of a qualified-immunity-based motion for summary judgment is immediately appealable to the extent that the district court has denied the motion as a matter of law, although not to the extent that the defense turns solely on questions of fact."[1223] In this case, the district court had held that the issues of immunity could not be decided without further factual development of the record.[1224] The district court rejected Defendants' argument that "if they are denied an immediate appeal, national security will inexorably be weakened," concluding that "[t]he events of 9/11, how-

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[1218] *Id.*

[1219] *In re* World Trade Ctr. Disaster Site Litig., 456 F. Supp. 2d 520 (S.D.N.Y. 2006) [hereinafter *WTC Disaster Site Litig. III*].

[1220] *In re* World Trade Ctr. Disaster Site Litig., 469 F. Supp. 2d 134, 137 (S.D.N.Y. 2007) [hereinafter *WTC Disaster Site Litig. IV*].

[1221] *Id.* at 138. *See also In re* World Trade Ctr. Disaster Site Litig., 503 F.3d 167, 169 (2d Cir. 2007) [hereinafter *WTC Disaster Site Litig. V*].

[1222] *WTC Disaster Site Litig. IV*, 469 F. Supp. 2d at 140, 145.

[1223] *Id.* at 138–39 (quoting Papineau v. Parmley, 465 F.3d 46, 54 (2d Cir. 2006)).

[1224] *See WTC Disaster Site Litig. III*, 456 F. Supp. 2d 520, 575.

ever tragic, [did] not furnish Defendants with a proper basis to invoke the collateral order doctrine."[1225] The district court further noted that because the collateral order doctrine applies to issues wholly separate from the merits of the action, it generally does not divest the court of jurisdiction over other issues not appealed.[1226] In sum, the district court found Defendants' argument was without merit.[1227]

In denying Defendants' motion for certification, the district court noted that the decision to certify orders for interlocutory appeal is left to the "unfettered discretion" of the district judge.[1228] The district court also noted that whether Defendants were entitled to immunity could not be determined without a developed record.[1229] The district court therefore found that an interlocutory appeal would not "materially advance the ultimate termination of the litigation."[1230] Moreover, the district court commented that an interlocutory appeal would likely lead to an "unconscionable" delay considering the "intense public interest" in the case.[1231]

Defendants petitioned the U.S. Court of Appeals for the Second Circuit for a writ of mandamus to halt the proceedings in the district court and moved for a stay of the proceedings.[1232] Plaintiffs moved to dismiss the appeal.[1233] An applications judge of the Second Circuit subsequently granted a temporary stay pending panel consideration of the stay motion and, thereafter, a motions panel granted a stay of the trial and pretrial proceedings, denied the petition for mandamus as moot, referred the motion to dismiss to the merits panel, and expedited the ap-

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1225 *WTC Disaster Site Litig. IV*, 469 F. Supp. 2d at 140.

1226 *Id.* (citing City of New York v. Beretta U.S.A. Corp., 234 F.R.D. 46, 50 (E.D.N.Y. 2006)).

1227 *WTC Disaster Site Litig IV*, 469 F. Supp. 2d at 140. The district court rejected Defendants' arguments that immediate appeal was necessary regarding immunity under the New York State Defense Emergency Act, the New York State Disaster Act, New York common law, the doctrine of derivative federal immunity, and the Stafford Act. *Id.* at 141–44. Having already found that facts were disputed and the issues could not be decided on the record, the district court found that this was not a proper basis to invoke the collateral order doctrine. *Id.*

1228 *Id.* at 144 (quoting 28 U.S.C. § 1292(b) (2000); Gulino v. Bd. of Educ., 234 F. Supp. 2d 324, 325 (S.D.N.Y. 2002)).

1229 *Id.* at 145.

1230 *Id.*

1231 *Id.*

1232 *See In re* World Trade Ctr. Disaster Site Litig., 503 F.3d 167, 169 (2d Cir. 2007).

1233 *Id.*

peal.[1234] However, after the Second Circuit heard the interlocutory appeal after "full briefing," it vacated the stay order, finding that the four factors relevant to issuing a stay pending appeal weighed against granting a stay.[1235] The Second Circuit addressed the relevant factors, *i.e.*, (1) a strong showing of likelihood to succeed by the stay applicant on the merits of the appeal; (2) the likelihood of irreparable injury if the stay is not issued; (3) the likelihood of substantial injury to other parties interested in the proceeding if the stay were to be issued; and (4) the public interest.[1236]

With respect to the first factor, the Second Circuit found that:

> Although we are not prepared at this time to resolve all of the many issues arising on the merits of the appeal, we can conclude that there is now a lesser probability than might have previously appeared that the Appellants will succeed in preventing at least some of the Plaintiffs' claims to proceed into at least the discovery stage of the litigation.[1237]

The Second Circuit found that, with respect to the second factor, any proceedings would "irreparably impair," to some degree, Defendants' alleged claim to immunity from suit.[1238] It noted that the third factor had "increased in significance with the passage of time since among the Plaintiffs are many people with life-threatening injuries, some of whom have died since the litigation began."[1239] The Second Circuit found that considera-

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[1234] *See id.* at 169. Several parties not directly involved in the appeal subsequently moved the district court for a determination whether the Second Circuit's stay order applied to the claims asserted against them, and several appealing Defendants moved for a determination of the scope of the stay order. *In re* World Trade Ctr. Disaster Site Litig., 514 F. Supp. 2d 556, 557–58 (S.D.N.Y. 2007) [hereinafter *WTC Disaster Site Litig. VI*]. In deciding this motion, the district court held that the Second Circuit's stay order did not extend to those Defendants that had not put forward arguable claims of immunity, but only to those parties that sought immunity and had appealed to the Court of the Appeals on those grounds. *Id.* at 558. The district court noted, however, that "[t]he non-appealing defendants may move to be included in the stay by agreeing to be bound by the outcome of the appeal, or taking prompt steps to join the appeal, or otherwise show good cause, within 20 calendar days of the date of this Order." *Id.* The district court also held that, as to the Defendant-Appellants, with respect to the scope of the stay order, the stay applied to all claims arising out of that geographic area the district court had previously defined as the "World Trade Center Site." *Id.* at 564.

[1235] *WTC Disaster Site Litig. V*, 503 F.3d at 170–71.

[1236] *Id.* at 170.

[1237] *Id.*

[1238] *Id.*

[1239] *Id.*

tion of the public interest could weigh either in favor of or against a stay of the proceedings, as it was important that Plaintiffs receive compensation, if due, during their lifetime, but there also was an important interest in protecting the immunity of those Defendants that might be entitled to it.[1240] While it was not clear what impact a decision on immunity grounds would have on Plaintiffs' potential recovery, the Second Circuit found that the balance weighed in favor of resuming proceedings.[1241] Accordingly, it vacated the stay order "and, while retaining jurisdiction to decide the pending appeal including the motion to dismiss, remand[ed] the litigation to the District Court, thereby restoring its jurisdiction to proceed with pretrial proceedings and a trial."[1242]

C. UNITED STATES V. MOUSSAOUI

The decision of the U.S. Court of Appeals for the Fourth Circuit in *United States v. Moussaoui*[1243] addressed whether Plaintiffs in the civil actions pending before the U.S. District Court for the Southern District of New York[1244] should be granted access to non-public information used in the prosecution of Zacarias Moussaoui.[1245] At the conclusion of Moussaoui's criminal trial in the U.S. District Court for the Eastern District of Virginia on charges of conspiracy relating to the September 11 terrorist attacks, Plaintiffs moved the Virginia district court "to Intervene for the Limited Purpose of Being Heard in Connection with Access to Certain Portions of the Record."[1246] Plaintiffs then "quickly" filed a subsequent motion requesting much broader access, arguing that under the Crime Victims Rights Act ("CVRA")[1247] and the ATSSSA, Plaintiffs were entitled to access to "all of the [G]overnment's information they turned over to the defense counsel in the . . . various discovery procedures ongoing over time."[1248] The Government opposed the motion, arguing that access could only be granted, if at all, through the

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[1240] *Id.* at 170–71.

[1241] *Id.*

[1242] *Id.* at 171.

[1243] 483 F.3d 220 (4th Cir. 2007).

[1244] The actions were *In re* Sept. 11 Litig., 21 MC 97; *In re* Sept. 11 Prop. Damage & Bus. Loss Litig., 21 MC 101; and Burnett v. Al Baraka Inv. & Dev. Corp., 03 Civ. 9849. *Id.* at 224.

[1245] *Id.*

[1246] *Id.*

[1247] 18 U.S.C.A. § 3771 (West 2008).

[1248] *Moussaoui*, 483 F.3d at 224–25 (quoting J.A. at 261).

civil discovery process underway in the Southern District of New York.[1249]

The Virginia district court granted Plaintiffs' motion to intervene, but restricted Plaintiffs' access to "non-classified and non-SSI[1250] evidence."[1251] The district court was persuaded that the CVRA and the ATSSSA set forth Congress' "unique interest" in providing Plaintiffs access to such information.[1252] In its decision, the Virginia district court commented "that it had 'always been troubled by the degree to which our government keeps things secret from the American people.'"[1253] Following the decision, Plaintiffs submitted expansive discovery requests, beyond the scope of the Virginia district court's order, and Defendants from the same civil actions requested access to any information provided to Plaintiffs.[1254] The Government also filed a motion for reconsideration of the order on the grounds that there was no legal basis for it.[1255] The Virginia district court denied the motion, noting that while it was "'disappointed' by the breadth of the discovery requests," it would not reconsider the order, stating that "whether a particular discovery request is relevant or appropriate to the litigation to which it is connected is far more properly left to the judge who is responsible for the overall case."[1256] The Virginia district court ordered that particular discovery requests to the Government were to be decided by the New York district court, and "also purported to grant the Southern District of New York the authority to alter the Eastern District of Virginia court's 'protective orders to allow for disclosure to additional qualified attorneys.'"[1257]

The Government appealed to the Fourth Circuit, arguing that the Virginia district court had no authority to allow Plaintiffs to intervene for discovery purposes, and that the order was immediately appealable pursuant to the collateral order doctrine.[1258] The Fourth Circuit found that "this case represents one of the exceedingly rare instances in which the collateral order doctrine

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1249 *Id.* at 225.

1250 The acronym SSI stands for "Sensitive Security Information" concerning civil aviation security. *Id.* at 224.

1251 *Id.* at 225.

1252 *Id.* (citing J.A. at 274).

1253 *Id.* (quoting J.A. at 273).

1254 *Id.* at 225–26.

1255 *Id.* at 226.

1256 *Id.* (quoting J.A. at 320–21).

1257 *Id.* (citing J.A. at 333).

1258 *Id.* at 226, 233–34.

should apply in the criminal context."[1259] It found this case to be unique because, *inter alia*, "[t]he collateral order doctrine is used almost exclusively as a means of resolving a disputed issue between *adverse* parties," whereas here Moussaoui, a criminal defendant, was not a party to the appeal and the dispute involved Plaintiffs in the civil litigation in New York—litigation in which the Government was not a Defendant.[1260] Its review of this order would in no way affect the outcome of Moussaoui's criminal case on the merits, "and accepting jurisdiction over the appeal in no way prolongs the Government's prosecution of Moussaoui, who has already been sentenced and has his direct criminal appeal pending in this court."[1261] The Fourth Circuit also noted that, if it did not accept the appeal in this instance, the Government would likely be left without any way to "review the [Virginia] district court's authority to enter the order."[1262]

Having found jurisdiction proper, the Fourth Circuit addressed the merits of the Government's appeal, *i.e.*, whether a district court hearing a criminal case has the authority to compel "the Government to provide non-public criminal discovery materials to victims for their use in civil litigation against third parties in a different jurisdiction."[1263] The Fourth Circuit held

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[1259] *Id.* at 226. Under the "final order rule," contained in 28 U.S.C.A. § 1291, federal courts of appeal only have jurisdiction over appeals of "final decisions," *i.e.*, those that put an end to the litigation. *Id.* at 227. The collateral order doctrine provides an exception that "entitles a party to immediately appeal 'from a narrow class of decisions that do not terminate the litigation, but must, in the interest of achieving a healthy legal system, nonetheless be treated as final' within the meaning of § 1291." *Id.* at 227–28 (quoting Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 867 (1994)). However, as the Fourth Circuit explained, the collateral order exception is "narrow," and "stringent" standards mandate that "[t]o come within the parameters of the collateral order doctrine, the order from which the appeal is taken must '[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from final judgment.'" *Id.* at 228 (quoting *Digital Equip.*, 511 U.S. at 868; Will v. Hallock, 546 U.S. 345 (2006)).

[1260] *Id.* at 229.

[1261] *Id.* at 231.

[1262] *Id.* at 232 (citing Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816 (1988)). In the event the New York district court sanctioned the Government for refusal to comply with discovery orders, "the Government would have to appeal any sanction order to the Second Circuit, and that Circuit would be forced to interpret an order from the Eastern District of Virginia, without any power to vacate that order." *Id.* (citing SongByrd, Inc. v. Estate of Grossman, 206 F.3d 172, 177 (2d Cir. 2001)).

[1263] *Id.* at 233.

that the Virginia district court had "no authority, inherent or otherwise, for [its] orders in this instance."[1264]

Although the Plaintiffs' arguments before the Virginia district court were primarily focused on statutory authority, the Fourth Circuit noted that the "Plaintiffs have abandoned the argument that the CVRA and ATSSSA granted the district court the authority to act in this instance," a strategy the Fourth Circuit found to be "wise . . . as nothing in those two statutes supports the district court's exercise of power."[1265] While the CVRA was designed to "guarantee [crime victims] some involvement in the criminal justice process," the Fourth Circuit found that those rights were limited to criminal proceedings and did not relate to proceedings relating to "civil claims against their assailants."[1266] Likewise, the ATSSSA was similarly unhelpful as it provided exclusive jurisdiction to the Southern District of New York and did not authorize the Eastern District of Virginia to issue the order in question.[1267]

The Fourth Circuit rejected the "thrust" of Plaintiffs' argument "that the district court had the inherent authority to do what it did, and that the limits of that inherent authority should be defined by the same limits placed on district courts" by the rules governing disclosure of grand jury minutes.[1268] The Fourth Circuit concluded that the Virginia district court's orders "were unprecedented and entirely unnecessary," and there was no case law "suggest[ing] that courts have an inherent authority to issue orders that facilitate the judicial process taking place in another case in another jurisdiction."[1269]

The Fourth Circuit thus reversed and vacated the Virginia district court's order allowing the Plaintiffs to intervene, noting that:

> We, like the district court, have great sympathy for the victims of September 11 and their families. They have endured the most abhorrent of acts. But regardless of how much respect and compassion this court has, we must ensure that the federal courts in

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[1264] *Id.* at 239.

[1265] *Id.* at 234.

[1266] *See id.* at 234–35 (quoting Kenna v. U.S. Dist. Court, 435 F.3d 1011, 1016 (9th Cir. 2006); *In re* Kenna, 453 F.3d 1136, 1137 (9th Cir. 2006)).

[1267] *Moussaoui*, 483 F.3d at 235.

[1268] *Id.* at 236 (citing FED. R. CRIM. P. 6(e); Douglas Oil Co. v. Petrol Stops Nw., 441 U.S. 211 (1979)).

[1269] *Id.* at 237.

our jurisdiction-no matter how well intentioned-do not exceed their legal power.[1270]

D. In re September 11 Litigation

In *In re September 11 Litigation*,[1271] the personal representatives of two passengers of American Airlines Flight 77[1272] commenced an action in the U.S. District Court for the Southern District of New York against several airlines, airports, and private security companies pursuant to the ATSSSA.[1273] The decedents were traveling pursuant to passenger tickets that included continuing travel from Los Angeles (the destination of Flight 77) to Sydney, Australia.[1274] Plaintiffs asserted multiple claims against the various defendants, including, *inter alia*, liability under the Warsaw Convention against Defendant American Airlines.[1275] Plaintiffs moved for summary judgment on the Warsaw Convention claims, arguing that Defendant was strictly liable under Article 17, and that on the basis of undisputed facts, "Defendant cannot sustain an affirmative defense under Article 20 of the Warsaw Convention that the carrier and its agents had 'taken all necessary measures to avoid the damage or that it was impossible for them to take such measures.'"[1276]

In opposing the motion, Defendant conceded that a terrorist hijacking was an Article 17 "accident."[1277] As such, Defendant was presumptively liable for the "accident" under the Warsaw Convention,[1278] but contested the extent of Defendant's liability.[1279] In its decision, the district court noted that Defendant's tariff (*i.e.*, "the terms and conditions of carriage between passenger and carrier") included provisions that "[b]y contract . . . waived the Warsaw Convention's limits on liability; waived the

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[1270] *Id.* at 238–39.

[1271] 500 F. Supp. 2d 356 (S.D.N.Y. 2007) [hereinafter *Sept. 11 Litig. I*].

[1272] American Airlines Flight 77 crashed into the Pentagon in Arlington, Virginia, on September 11, 2001. *See id.* at 357.

[1273] *Id.* at 357–58. Defendants other than American Airlines included AMR Corp.; Airtran Airways, Inc.; Atlantic Coast Airlines, Inc.; Continental Airlines, Inc.; Delta Airlines, Inc.; National Airlines, Inc.; Northwest Airlines Corp.; United Airlines, Inc.; U.S. Airways, Inc.; Argenbright Security, Inc.; Securicor, PLC; Metropolitan Washington Airports Authority; and the Boeing Co. *Id.* at 358 n.2.

[1274] *Id.* at 357.

[1275] *Id.* at 358 n.2.

[1276] *Id.* at 358 (citing Warsaw Convention, *supra* note 564, art. 17, 20).

[1277] *Id.* at 359 (citing Pflug v. Egyptair Corp., 961 F.2d 26, 29 (2d Cir. 1992)).

[1278] *Id.* at 358–59 (citing Warsaw Convention, *supra* note 564, art. 17; Magan v. Lufthansa German Airlines, 339 F.3d 158, 161 (2d Cir. 2003)).

[1279] *See id.* at 360–61.

Article 20 defense below 100,000 Special Drawing Rights; and reserved the Article 20 defense above 100,000 Special Drawing Rights."[1280] Accordingly, the district court granted partial summary judgment "in the amount of the equivalent in United States dollars of 100,000 [SDRs]."[1281]

In considering Plaintiffs' claims that Defendant could not sustain the Article 20 affirmative defense relating to the portion of their claims in excess of 100,000 SDRs, the district court noted that Article 20 of the Warsaw Convention provides:

> In the carriage of passengers and baggage, and in the case of damage occasioned by delay in the carriage of cargo, the carrier shall not be liable if he proves that he and his servants have taken all necessary measures to avoid the damage or that it was impossible for them to take such measures.[1282]

The district court then adopted the interpretation of most courts that have construed the "all necessary measures" language as meaning "all reasonable measures" and noted that Defendant's burden to demonstrate this affirmative defense was "high."[1283]

With respect to this portion of Plaintiffs' claims, Defendant argued that "summary judgment [was] premature because: 1) the relevant standard of care is undefined; 2) the admissibility of passages of the 9/11 Commission Report is undetermined; and 3) discovery is incomplete."[1284] Defendant also argued that genuine issues of material fact precluded summary judgment.[1285] In addressing Defendant's arguments, the district court first rejected the assertion that the standard of care was, as of yet, undefined, finding that "the standard of care that Defendant must satisfy in order to sustain its affirmative defense is set forth in the Warsaw Convention treaty itself: Defendant must prove that it took 'all [reasonable] measures to avoid damages.'"[1286] The district court found that it was unnecessary to rule on the admissibility of the 9/11 Commission Report to decide the summary

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[1280] *Id.* at 361.

[1281] *Id.* The Southern District did not rule on the issue of interest, noting that the parties could address the issue when the remainder of the issues were presented for decision. *Id.*

[1282] *Id.* at 359 (quoting Warsaw Convention, *supra* note 564, art. 20).

[1283] *Id.* at 359–60.

[1284] *Id.* at 362.

[1285] *Id.*

[1286] *Id.* (quoting Warsaw Convention, *supra* note 564, art. 20).

judgment motion and declined to make "abstract and hypothetical rulings" relating to its admissibility.[1287]

However, the district court found that Plaintiff's motion relating to Defendant's Article 20 "all necessary measures" defense was premature, and that Defendant was entitled to additional discovery in order to provide it with an opportunity to demonstrate that it had established the defense.[1288] The district court stated:

> Defendant has the burden to show the risks of which it was or reasonably should have been aware, the measures it took to avoid or mitigate the risk, the nature and scope of government regulations and whether such regulations were guides to its conduct or imposed limitations on actions that it otherwise would have taken, and how all of these measures, and others that might be relevant, relate to the damage suffered by Plaintiffs.[1289]

The district court further noted that whether Defendant took "all reasonable measures" is judged not only against those measures required by federal law, but also may include consideration of measures outside the scope of federal regulation because:

> Even if Congress has regulated the field of aviation security so pervasively that no room is left for concurrent state regulation—an open question of law in this Circuit—a duly ratified treaty retains its force as co-equal federal law under the Supremacy Clause. Thus a jury may find that an air carrier complied with all of its regulatory obligations, but nevertheless failed to take all reasonable measures to avoid the damage caused by the accident.[1290]

Accordingly, the district court denied the motion without prejudice with respect to claims exceeding 100,000 SDRs, finding Plaintiffs' summary judgment motion premature on the record before it.[1291]

[1287] *Id.* at 362–63.

[1288] *Id.* at 363.

[1289] *Id.*

[1290] *Id.* at 360 (citations omitted).

[1291] *Id.* at 365. The district court also rejected Plaintiffs' claim that they had the right to recover litigation expenses and attorneys' fees under the Warsaw Convention liability regime, finding that the liability regime did not create a right of reimbursement of attorneys' fees, and U.S. law, both federal and state, did not support Plaintiffs' claims either. *Id.* at 364–65.

E. IN RE SEPTEMBER 11TH LITIGATION

The U.S. District Court for the Southern District of New York ordered "reverse" bifurcated trials on the issues of damages in certain *In re September 11th Litigation*[1292] cases.[1293] The district court noted that its decision was motivated by growing frustration with the slow pace of the litigation, especially among the families of the forty-two victims, whose forty-one cases remained pending before it nearly six years after September 11.[1294] The district court noted that the families had chosen to bring suit pursuant to the ATSSSA rather than receive compensation from the September 11th Victim Compensation Fund and shared their concerns about the prolonged pre-trial process, noting that:

> Time heals, but time also works against us. Elderly parents who brought actions on behalf of their deceased children will not live forever. Grieving widows and friends waiting for these proceedings to bring them closure may wait too long. And the public, in measures both large and small, share the families' concerns. Many would like to see Plaintiffs' assertions tested in a trial and either found or rejected in a jury verdict. For such persons, long delays are a frustration and denial of the justice sought.[1295]

The district court noted that the decision to order bifurcated trials is within its discretion under Federal Rule of Civil Procedure 42(b),[1296] which permits separate trials if "conducive to expedition and economy."[1297] The district court explained that bifurcated trials are appropriate only if "the issue contemplated for separate trial, *i.e.* liability and damages, is sufficiently 'distinct and separable from the others that a trial of it alone may be had without injustice.'"[1298] In this case, the district court found:

> [T]hat [the] issues of damages are distinct and separable from issues of liability, and thus a separate trial of each may be had

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[1292] No. 21 MC 97(AKH), 2007 WL 1965559 (S.D.N.Y. July 5, 2007) [hereinafter *Sept. 11th Litig. III*].

[1293] *Id.* at *1.

[1294] *Id.* at *1–*2.

[1295] *Id.* at *1.

[1296] *Id.* at *2 (citing *In re* Master Key Antitrust Litig., 528 F.2d 5, 14 (2d Cir. 1975)).

[1297] *Id.* (quoting FED. R. CIV. P. 42(b)).

[1298] *Id.* (quoting Gasoline Prods. Co. v. Champlin Ref. Co., 283 U.S. 494, 500 (1931)).

> without prejudice to either side. The allegedly negligent acts committed by the airlines and their security contractors have no relation to the amount of compensatory damages that Plaintiffs would recover. Because Plaintiffs sue for wrongful death, and their deaths were sudden and final, caused, they allege, by discrete acts over a limited period of time, the jury does not need to consider the extent to which Defendants' allegedly negligent acts caused decedents' deaths. If liable, Defendants caused all of the victims' wrongful deaths or personal injuries, if not liable, Defendants caused no part of the victims' deaths or injuries.[1299]

The district court explained that its decision was intended to facilitate settlements by scheduling damages-only trials to precede liability trials, as ongoing settlement discussions had appeared to reach "an impasse."[1300] The district court noted that, while some Plaintiffs were unlikely to settle on any terms, certain other Plaintiffs appeared willing to settle, but were unable to "because of disparity in perceived values between plaintiffs and defendants."[1301] The district court found that, with further passage of time, "the prospects for settlement are likely to dim, as positions harden and disparity of perception becomes entrenched," and concluded that trying the issue of damages first would likely encourage settlement by presenting a "range of values that a jury is likely to award in similar cases."[1302] The district court also reasoned that ordering damages trials to precede trial on the issue of liability would be "economical" because only limited discovery would be needed, and "most plaintiffs ha[d] already obtained experts' reports on economic and other issues of damages."[1303]

Accordingly, the district court ordered six cases, based upon the recommendation of liaison counsel, to prepare for damages trials in an attempt to "hasten the resolution of these and many other cases and thus be a significant step in mending the wounds left open by the terrorist-related aircraft crashes of September 11, 2001."[1304] All six of the cases settled before trial.

1299 *Id.* at *3.

1300 *Id.* at *2.

1301 *Id.*

1302 *Id.*

1303 *Id.* at *3.

1304 *Id.* The district court subsequently issued several orders related to the pending damages trials. *See In re Sept. 11 Litig.*, No. 21 MC 97(AKH), 2007 WL 3036439, at *3–*4 (S.D.N.Y. Oct. 17, 2007) (granting in substantial part Defendants' motion *in limine* to exclude certain evidence, including: evidence regarding decedent's prospective income where it was merely speculative that Plaintiffs, de-

F. In re September 11 Litigation

In *In re September 11 Litigation*,[1305] the U.S. District Court for the Southern District of New York addressed whether: (1) Plaintiffs could recover punitive damages with respect to personal injury and wrongful death claims from Defendant airlines, airport operators, airport security companies, and aircraft manufacturers; and (2) whether Pennsylvania law governed claims for compensatory damages commenced by eight Plaintiffs who died onboard United Airlines Flight 93 when it crashed in Pennsylvania.[1306] Defendants moved to strike Plaintiffs' punitive damages claims, and Plaintiffs had moved the district court for a declaration that Pennsylvania law governed claims for compensatory damages for the claims arising from Flight 93.[1307]

In opposition to Defendants' motion to strike the punitive damages claims, Plaintiffs argued that because the phrase "punitive damages" was mentioned twice in the text of the ATSSSA, it was clear that Congress had intended that "punitive damages must . . . be recoverable, as a matter of federal law and regardless of whether the relevant state law would allow such recov-

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cedent's parents, had any reasonable expectation of receiving future financial contributions from decedent; and extrinsic evidence of the events of 9/11 and Flight 77, including, *inter alia*, the Flight 93 cockpit voice recorder ("CVR") recording and facts from the Moussaoui trial). The district court found that Plaintiffs were "free to testify about the matters they viewed or learned from whatever source, including their reactions," but held that the "items of extrinsic evidence themselves and the testimony of others are inadmissible" pursuant to Fed. R. Evid. 403 because any "slight relevance" to Plaintiffs' claimed mental anguish was outweighed by "its high likelihood of prejudicing, confusing and misleading the jury." *Id.* at *5. *See also Sept. 11 Litig.*, No. 21 MC 97(AKH), 2007 WL 2668608, at *3 (S.D.N.Y. Sept. 12, 2007) (applying New Jersey law, as the law of decedent's domicile, and granting in part and denying in part Plaintiff's motion *in limine* to introduce the recording from the CVR from Flight 93 in the damages-only trial as evidence of decedent's pre-death pain, suffering, and emotional distress). The district court found that most portions of the CVR recording, as evidence of what occurred in the cockpit, were inadmissible as "either not relevant, because [decedent] could not hear or otherwise perceive that which was recorded or depicted, or [because it would] invade unnecessarily the privacy of other passengers and crew members and their families." *Id.* However, the district court held that two specific portions of the recording and related computer animations "relevant to the passengers' awareness" of the situation were admissible, if proven authentic and capable of being heard from decedent's seat. *Id.*

[1305] 494 F. Supp. 2d 232 (S.D.N.Y. 2007) [hereinafter *Sept. 11 Litig. II*]. As of the date of this decision, forty-one wrongful death and injury cases (on behalf of forty-two victims), out of the initial ninety-five (on behalf of ninety-six victims) remained before the court. *Id.* at 236.

[1306] *Id.*

[1307] *Id.* at 236–37.

eries."[1308] The district court disagreed, finding that the ATSSSA neither expressly "bars nor provides" for a federal punitive damage remedy.[1309] The district court noted that the ATSSSA was enacted "to benefit the aviation defendants, not those who sue the aviation defendants," and to protect the airlines "against the possibility of ruinous liability" by limiting the extent of certain Defendants' liability to the extent of their insurance coverage.[1310] The district court explained:

> In the context of the airlines' exposure to potentially ruinous liability, and the equity of providing sufficient funds so that all claimants would have equal right to the fullest compensation to which they might be entitled under law, the argument against punitive damage recoveries is strong. Punitive damages are recovered unevenly, in large and small amounts and by different plaintiffs and, in the context of a limited fund, endanger the capacity of the fund to compensate all plaintiffs in accordance with their provable injuries.[1311]

The district court then ruled that, under the ATSSSA, the issue of punitive damages was to be determined by the substantive law of the state where the crash occurred, including its choice of law principles.[1312]

With respect to claims relating to the crashes at the World Trade Center, the district court determined that New York law applied.[1313] New York's choice of law principles require a court to conduct an "'interest analysis[,]' [which] entails finding 'the jurisdiction having the greatest interest in the litigation,' where the jurisdiction's interest is measured in terms of the 'purpose of the particular law in conflict.'"[1314] The district court noted that punitive damages are designed to "regulate standards of conduct," and when a conflict is presented by conduct regulating laws, the law of the place of the tort usually has the most significant interest, and "[t]herefore *lex loci delicti*—the law of the place of the tort—applie[d] to Plaintiffs' claims for punitive

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[1308] *See id.* at 238.

[1309] *Id.*

[1310] *Id.*

[1311] *Id.*

[1312] *Id.* at 238–39. The district court noted that Plaintiffs could pursue punitive damages against Defendant Argenbright Security because the ATSSSA limits of liability did not apply to it and, thus, a punitive damages recovery could be paid without insurance proceeds. *Id.* at 242.

[1313] *Id.* at 239.

[1314] *Id.* (quoting Schultz v. Boy Scouts of Am., Inc., 480 N.E.2d 679, 684 (N.Y. 1985)).

damages."[1315] The district court further noted that "[w]here the defendant's misconduct and the plaintiff's injury occur in different jurisdictions, the place of the tort is the jurisdiction where the 'last event necessary' to make the defendant liable occurred."[1316] However, in this case, as the district court explained:

> [T]he place of the tort could plausibly be Massachusetts, because defendants screened [the flights] at Logan Airport in Boston, or New York, where the crash, the last event necessary to give rise to wrongful death liability, occurred. For claims arising out of a "disaster befalling a plane aloft," however, "the place of the crash is often random or, as here, fixed by a warped mind," and thus legitimate reasons to deviate from the *lex loci delicti* rule may exist.[1317]

The district court noted that "punitive damages are not permissible if the source of recovery would come from insurance funds" under either New York or Massachusetts law and, therefore, a true conflict was not presented, and then ruled that New York had the greatest interest in having its law relating to the recovery of punitive damages applied because of the "special effect" that the events of September 11th had there, including the deaths of several thousand New Yorkers and the destruction of billions of dollars of New York property.[1318] Because the ATSSSA restricts Plaintiffs' recovery, if any, to the extent of Defendants' insurance funds, and New York law does not permit an insurer to indemnify an insured for punitive damages under any circumstances, the district court held that "[p]unitive damages are therefore unavailable as a matter of law" with respect to claims relating to American Airlines Flight 11 and United Airlines Flight 175.[1319]

[1315] *Id.* (citing *Schultz*, 480 N.E.2d at 685).

[1316] *Id.*

[1317] *Id.* (quoting Pescatore v. Pan Am. World Airways, Inc., 97 F.3d 1, 13 (2d Cir. 1996) and citing *In re* Air Crash at Belle Harbor, N.Y. on Nov. 12, 2001, No. 1448(RWS), 2006 WL 1236688 (S.D.N.Y. May 9, 2006) ("applying admiralty law to passengers' punitive damages claims arising out of aircraft disaster in New York")).

[1318] *Id.* at 239–40.

[1319] *Id.* at 240 (citing Pub. Serv. Mut. Ins. Co. v. Goldfarb, 425 N.E.2d 810, 814–15 (N.Y. 1981)). The parties agreed that, assuming the ATSSSA did not control, Virginia law applied to American Airlines Flight 77, which crashed in Virginia, and, thus, injured and wrongful death Plaintiffs could recover a "statutory maximum of $350,000, in the aggregate, from all defendants named in the particular action." *Id.*

With respect to claims relating to Flight 93, the district court ruled that Plaintiffs were similarly not allowed to recover punitive damages against all Defendants, with the exception of a defendant transportation security company, under Pennsylvania law.[1320] Because Flight 93 crashed in Pennsylvania, Pennsylvania's choice of law principles were applicable, which required an "interest analysis" considering the policies of all states potentially interested in the litigation.[1321] The district court found that Pennsylvania and New Jersey had the strongest interests in regulating Defendants' conduct via the imposition of punitive damages because United Airlines Flight 93 had crashed in Pennsylvania, and the hijackers had been "ticketed and screened" at Newark Airport in New Jersey.[1322] The district court also found that Illinois, United Airlines' principal place of business, and Washington, Boeing's principal place of business, also would have an interest in regulating Defendants' conduct.[1323] However, because the laws of all four states, like New York, uniformly prohibited an insurer from indemnifying an insured for punitive damages awards, the district court ruled that punitive damages were not available in connection with claims relating to United Airlines Flight 93.[1324]

With respect to Plaintiffs' motion to apply Pennsylvania law to all compensatory damages on claims arising from Flight 93, the district court rejected Plaintiffs' claim that Pennsylvania law should be applied to "ensure uniformity of result and adequacy of compensation."[1325] The district court explained that, under an "interest analysis" approach to choice of law, a decedent's domicile usually has the greatest interest in having its law applied on the issue of compensation, and that here, Pennsylvania's interest was minimal as "[t]he terrorist hijackers did not intend to strike Pennsylvania and, alas, the passengers did not select the place of their heroic sacrifice."[1326] In short, "Pennsylvania's governmental interest in having its law applied is considerably less than the governmental interest of the parties' domicile states with respect to compensatory damages."[1327]

[1320] *Id.* at 241.

[1321] *Id.* at 240–41 (citing Budget Rent-A-Car Sys., Inc. v. Chappell, 407 F.3d 166 (3d Cir. 2005)).

[1322] *Id.* at 241.

[1323] *Id.*

[1324] *Id.* at 241–42 (collecting cases).

[1325] *Id.* at 242–43.

[1326] *Id.* at 243.

[1327] *Id.* at 242.

The district court then held that "the law governing the compensatory damages to which each plaintiff is entitled, should he prove his case, shall be the law of the plaintiff's state of domicile. The interest of a plaintiff's domicile state in protecting the well-being of surviving dependents will be fully vindicated by application of its own law."[1328]

G. In re September 11th Liability Insurance Coverage Cases

In *In re September 11th Liability Insurance Coverage Cases*,[1329] the U.S. District Court for the Southern District of New York imposed sanctions totaling $1.25 million on Defendant Zurich American Insurance Company and the two law firms it had retained as outside counsel in the litigation, for violations of Rules 11 and 37 of the Federal Rules of Civil Procedure.[1330] Rule 11 prohibits an attorney from making false or unsupported representations to the court, and Rule 37 permits the imposition of sanctions upon parties that fail to comply with discovery obligations by failing to disclose by, *inter alia*, destroying or delaying production of requested information.[1331]

The underlying litigation arose out of a dispute concerning whether the Port Authority of New York and New Jersey ("the Port Authority"), owner and operator of the World Trade Center, and Westfield Corporation, Inc., lessee of retail space in the concourse and street-level space in Towers One and Two, were covered under a primary Commercial General Liability Policy, issued pursuant to an insurance binder to World Trade Center Properties LLC ("WTCP"), a Larry A. Silverstein holding company that controlled both the "Silverstein Net Lessees"[1332]

1328 *Id.*

1329 243 F.R.D. 114 (S.D.N.Y. 2007). One of the defendants in *In re World Trade Ctr Disaster Litig.*, World Trade Center Properties LLP, "brought a third-party action against Zurich for declaratory relief regarding Zurich's obligations to WTCP and to other parties." *Id.* at 117. Zurich responded with "a fourth-party action and an original complaint against WTCP, the Port Authority, and Westfield, among others." *Id.* The Southern District court consolidated the third- and fourth-party actions for pre-trial purposes as the *Liability Insurance Coverage Cases*. *Id.*

1330 *See id.* at 116–17, 132.

1331 *Id.* at 123–25.

1332 *Id.* at 116. Larry Silverstein formed four Delaware limited liability companies (the "Silverstein Net Lessees") to hold the leases to the World Trade Center towers. *Id.* at 119 n.3. The Silverstein Net Lessees are 1 World Trade Center LLC, 2 World Trade Center LLC, 4 World Trade Center LLC, and 5 World Trade Center LLC. *Id.*

and the "Net Lessees' Association."[1333] Defendant Zurich claimed that neither Westfield nor the Port Authority was entitled to insurance coverage following the destruction of certain buildings within the World Trade Center.[1334] During the litigation, Zurich, through its counsel, alleged that neither the Port Authority nor Westfield was insured under the policy, and that there was "an absence of evidence that the parties intended to name the Port Authority as an Additional Insured."[1335]

Subsequently, it became clear through the deposition testimony of underwriters for the subject liability policy, and the untimely production of a sixty-two page internal "primary policy" document from September 11, 2001 (the "9/11 Document") which, as the district court noted, was "clearly important"[1336] and "not the type of document that inadvertently becomes lost without a trace,"[1337] that there was evidence indicating that both the Port Authority and Westfield were indeed insured under the terms of Defendant's binder.[1338] The Port Authority and Westfield subsequently moved for sanctions against Zurich, and its counsel, based on Rules 11 and 37.[1339] The Port Authority and Westfield argued that Zurich and its counsel had asserted positions that were "objectively unreasonable," and breached their discovery obligations by failing to produce responsive evidence, unnecessarily delaying production, and destroying the electronic version of the 9/11 Document.[1340] In this regard, the district court noted:

[1333] *Id.* at 116. The Silverstein Net Lessees and Westfield WTC LLC, the Westfield Lessee of the retail space within the towers and concourse levels, created a "Net Lessees' Association" that had the obligation to obtain liability insurance for its member lessees, including the Westfield net lessee. *Id.* at 119.

[1334] *Id.* at 117.

[1335] *Id.* at 126.

[1336] The 9/11 Document contained a "Broad Form Named Insured" endorsement that "listed as named insureds: World Trade Center Properties, LLC c/o Silverstein Properties, Inc. and *any subsidiary company* as now formed or constituted, and *any company over which the named insured has active control* so long as the named insured or any subsidiary company has an ownership interest of more than 50% of such company." *Id.* at 119–20. The district court noted that this endorsement "would confer 'Additional Insured' status on the Port Authority" and "likely conferred 'Additional Insured' status on Westfield." *Id.* at 120.

[1337] Zurich's attorneys took possession of the 9/11 Document in March 2003, but it was not produced until February 2005, "after depositions had been completed and following pointed inquiries by opposing counsel, following up trace references in other of Zurich's productions." *Id.*

[1338] *Id.* at 123.

[1339] *Id.*

[1340] *See id.* at 117, 130.

> The issues regarding the Port Authority's and Westfield's insurance status were vigorously litigated in motions and discovery proceedings and at conferences. Ultimately, Zurich abandoned its contentions as to the insured status of the Port Authority and Westfield, but not until its contentions prevented the Port Authority from prevailing on a Rule 12(c) motion, requiring extensive discovery proceedings to explore the issues of fact raised by Zurich's denials and defenses.[1341]

With respect to the Port Authority's Rule 11 motion, the district court noted that although evidence later produced clearly established that Zurich was aware of the Port Authority's status under the policy, even without this evidence, "[s]imply put, Zurich's position made no sense, because the parties would not have agreed to insure a holding company with no operations and no direct holdings, without an understanding and intent to insure the subsidiary entities that would actually be exposed to premises liability."[1342] The district court thus granted the Port Authority's motion for Rule 11 sanctions against the insurer, finding its factual assertions in this respect "objectively without rational basis."[1343] Accordingly, the Southern District imposed a sanction of $750,000 for the Rule 11 violations, half of which was allotted to reimburse the Port Authority for extra attorneys' expenses incurred as a result of Zurich's actions.[1344]

Although large, the district court reasoned that the sanction imposed was "not so large as to be disproportionate to the strong public interest, the waste caused to judicial and attorney resources, and the amounts at stake in the litigation."[1345] The district court further noted that, with respect to Rule 11, "Zurich's decision to assert and maintain its denials and defenses regarding the Port Authority's status as Additional Insured multiplied proceedings, caused substantial expense to the parties, caused substantial waste of court time, and insulted public and judicial expectations of the standard of conduct expected of attorneys and insurance carriers."[1346]

However, the district court denied Westfield's Rule 11 motion, finding that although it was established that Zurich intended to provide liability insurance coverage to Westfield,

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[1341] *Id.* at 117.
[1342] *Id.* at 128.
[1343] *Id.*
[1344] *Id.* at 131.
[1345] *Id.* at 131–32.
[1346] *Id.* at 131.

Zurich's allegations were not "utterly lacking in support" because, *inter alia*, "Westfield is not mentioned by name in the [applicable insurance] binder, and the references in the parties' communications about Westfield were not always consistent or clear."[1347]

With respect to the Rule 37 motions, the district court noted that, under the applicable three-part test for sanctions under this Rule, both the Port Authority and Westfield had to establish: "(1) that Zurich had control over the documents and had an obligation to produce them; (2) that Zurich failed timely to produce the evidence with 'a culpable state of mind'; and (3) that the untimely produced documents were 'relevant' to their claims or defenses."[1348] The district court found that both the Port Authority and Westfield had satisfied this burden, and that it was clear that "Zurich's and its attorneys' delays and destructions multiplied proceedings and caused undue time and expense."[1349] The district court found that "Zurich's 'culpable state of mind' [was] established by evidence that it intended to delete, and deleted, the electronic version of the 9/11 Document, and by evidence that Zurich or its attorneys, or both, had possession of the printed version of the 9/11 Document, but failed to produce it."[1350]

In addressing the amount of the Rule 37 sanctions, although the district court noted that sanctions are intended to "restore the parties to the position they would have occupied but for the breach of discovery obligations," the district court found that it was impossible to determine how much additional and unnecessary time the parties had expended on this issue specifically and granted only $500,000 in sanctions, substantially less than requested.[1351]

[1347] *Id.* at 128–29.

[1348] *Id.* at 129 (citing Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 107 (2d Cir. 2002)).

[1349] *Id.* at 130, 132.

[1350] *Id.* at 130.

[1351] *Id.* at 131–32 (citing Estate of Calloway *ex rel.* LMN Prods. v. Marvel Entm't Group, 9 F.3d 237, 241 (2d Cir. 1993); Eastway Constr. Corp. v. City of New York, 821 F.2d 121, 123 (2d Cir. 1987)).

VIII. INSURANCE COVERAGE

A. GLOBAL AEROSPACE, INC. V. ARTHUR J. GALLAGHER & CO. INSURANCE BROKERS OF CALIFORNIA, INC.

In *Global Aerospace, Inc. v. Arthur J. Gallagher & Co. Insurance Brokers of California, Inc.*,[1352] Plaintiff insurer sued Defendant insurance broker, Arthur J. Gallagher & Co., which had procured insurance on behalf of the insured charter company, Regent Air, to recover monies paid on behalf of the insured following the crash of one of its aircraft on March 13, 2002, in Reno, Nevada.[1353] The crash occurred when the aircraft, piloted solely by Jesse Gallagher, left the runway and crashed into a commercial building while attempting to land in snow and freezing fog.[1354] The crash caused significant damage to the aircraft and building, as well as injuries to the pilot and five passengers.[1355] Global Aerospace paid claims associated with the crash, and then sued Regent Air's broker, contending that there was no coverage under its policy for the crash because of the policy's pilot warranty requirement.[1356] As a result, Global Aerospace sought to recover the payments made on behalf of the insured from the Defendant broker Arthur J. Gallagher & Co.[1357]

There was no dispute that the crash occurred after the expiration of an initial insurance policy, but before the formal issuance of the renewal policy.[1358] Coverage, however, had been bound by issuance of a binder.[1359] There also was no dispute that the pilot of the aircraft involved in the accident, Mr. Gallagher, was approved only to fly as a co-pilot under the express terms of the initial policy, which contained a pilot warranty, limiting coverage to pilots in command with certain experience requirements.[1360] Defendant broker's employee, unaware of the

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[1352] No. CIV. S-06-594 LKK/KJM, 2007 WL 1695102 (E.D. Cal. June 8, 2007).

[1353] *Id.* at *1.

[1354] *Id.*

[1355] *Id.*

[1356] *Id.* at *1–*2.

[1357] *Id.* at *1.

[1358] *Id.* at *5.

[1359] *Id.* at *2. A binder is a contract separate and distinct from the policy that includes the "most important terms of the preliminary contract of insurance, intended to give temporary protection pending the investigation of the risk by the insurer or until the issuance of a formal policy." *Id.* at *2 n.5 (quoting Ahern v. Dillenback, 1 Cal. Rptr. 2d 339, 345 (Ct. App. 1991)).

[1360] *Id.* at *2. Although not directly addressed by the district court, an insurance policy typically will either "list by name the pilots during whose operation the aircraft will be covered, or list the qualifications and experience to be pos-

conditions of the applicable pilot warranty in the initial policy, had mistakenly informed Regent Air prior to the crash, that it had "as approved by" coverage.[1361] The court concluded that there was "no evidence that defendant ever requested 'as approved by' coverage."[1362]

Although Plaintiff contended that there was no coverage for the crash, it agreed to pay for claims arising out of the crash pursuant to a Dispute Resolution Agreement entered into with Defendant.[1363] Under the Agreement, if a court later determined that the insurance policy did not apply to Regent Air's claims or "would not so apply but for the representation, or other actions or inactions of Broker," Defendant was to reimburse Plaintiff for all claims it had paid.[1364] Based on this Agreement, Plaintiff commenced the subject action under theories of breach of contract, negligence, equitable indemnity, and equitable subrogation.[1365] Defendant countered that it had "impliedly requested an expansion of coverage" to include Gallagher as a pilot in command and that Plaintiff's "failure to respond to this request obligated them to furnish the requested coverage."[1366] Defendant also filed a counterclaim for reformation of the policy, alleging that it did not conform to the intent of the parties, which was to provide coverage that included Jesse Gallagher as a pilot in command.[1367]

Plaintiff originally issued a one-year policy to Regent Air for the period 2001–2002 that contained a pilot warranty limiting coverage for the aircraft to Regent owner Gerald Canavan, and other pilots in command, that satisfied certain experience re-

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sessed by pilots flying the insured aircraft. In certain instances, the schedule will provide for the aircraft to be covered while it is being flown by pilots in the employ of, or pilots approved by, the insured." ROD D. MARGO, AVIATION INSURANCE 121–22 (2d ed. 1989) (1980).

1361 *Global Aerospace*, 2007 WL 1695102, at *2.

1362 *Id.*

1363 *Id.* at *3. The Dispute Resolution Agreement provided, in relevant part: "Broker agrees that, should it later be determined by a court of law . . . that the Policy does not apply to the claims . . . or that the policy would not so apply but for the representation, or other actions or inactions of Broker . . . Broker shall reimburse Insurer for all such claims paid by Insurer." *Id.*

1364 *Id.*

1365 *Id.* at *1.

1366 *Id.*

1367 *Id.* Defendant alleged that after receiving the written quote for the 2002–2003 policy that Plaintiff's underwriter informed Defendant's broker that the new policy would provide "as approved by coverage." *Id.* at *2.

quirements.[1368] Defendant broker's employee was not aware of the conditions of the pilot warranty, and apparently believed (until after the crash) that coverage applied to pilots in command "as approved by" Canavan.[1369] As a result, the broker incorrectly informed Regent Air that it had "as approved by" coverage at least twice before the crash.[1370]

Prior to the expiration of the 2001–2002 policy, Defendant sent Regent Air's renewal information to Plaintiff, which included a completed insurance application and pilot qualification forms for each of Regent Air's pilots.[1371] The application, which distinguished between "Captains" and "Co-pilots," listed Canavan and Gallagher as Captains (and a third person as a Co-pilot).[1372] Plaintiff's underwriter, however, did not read that section of the application.[1373] Eventually, Regent Air agreed to renew its coverage for the 2002–2003 period based on essentially the same terms and conditions as the expiring 2001–2002 policy, and a binder of coverage was issued, pending the issuance of a formal policy.[1374] However, the subject crash occurred approximately ten days after the expiration date of the renewal policy, and a formal policy for the 2002–2003 period had not yet been issued.[1375]

The parties filed cross-motions for summary judgment.[1376] The U.S. District Court for the Eastern District of California found that, as a matter of law, the parties had agreed to the key terms of coverage for the renewal policy, despite the fact that a formal policy had not been issued, and that the binder, a "temporary, preliminary contract of insurance," was in effect on the date of the crash and governed the coverage provided by Plaintiff Global.[1377]

1368 *Id.*

1369 *Id.*

1370 *Id.*

1371 *Id.*

1372 *Id.*

1373 *Id.*

1374 *Id.*

1375 *Id.* at *1–*2.

1376 *Id.* at *1.

1377 *Id.* at *5 (citing Parlier Fruit Co. v. Fireman's Fund Ins. Co., 311 P.2d 62, 70–71 (Cal. Dist. Ct. App. 1957)). The court noted that binders exist because the beneficial effect of the insurance system would be "greatly impaired" if an "applicant could not be made secure until all the formal documents were executed and delivered." *Id.* (quoting *Parlier*, 311 P.2d at 70–71).

Turning to the issue of the scope of the coverage provided by the binder, Defendant argued that, because the Insured's application requested an expansion of coverage, which Plaintiff failed to respond to, Plaintiff should be required to provide the expanded coverage.[1378] Plaintiff contended that its response set forth the complete terms of the renewal coverage, and because the renewal binder was bound on the same terms as the 2001–2002 policy ("pilot warranty," not "as approved by" coverage),[1379] it had, in effect, responded to any request for a change in coverage.[1380] The district court found that whether the coverage requested was an expansion was immaterial because the "real issue" was that the Insured wanted coverage for Captain Jesse Gallagher, and Plaintiff Global had failed to act specifically on that request.[1381] The district court went on to find that Plaintiff's response (the issuance of a binder based on expiring terms) would not have "alert[ed] a reasonable person that the particular request for coverage had been denied."[1382] Based on the above, the district court concluded that the binder's scope of coverage was ambiguous and, thus, it was required to construe the scope of coverage such that the "objectively reasonable expectations of the insured" would be protected,[1383] and to resolve any ambiguities against the party that caused the uncertainty to exist.[1384] While the district court noted that the uncertainty or ambiguity as to the scope of coverage was created by both Plaintiff and Defendant, it concluded that it was necessary that the ambiguity be resolved in favor of Defendant because insurers have a general duty to respond to requests for insurance,[1385] and Plaintiff had drafted the "as per the expiring policy" language in the binder, which incorporated the terms of the previous policy (also drafted by Plaintiff).[1386] Accordingly, even though the insurers had no general duty to investigate a

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[1378] *Id.* (citing Barrera v. State Farm Mut. Auto. Ins. Co., 456 P.2d 674, 684 (Cal. 1969)).

[1379] *Id.* at *1–*2.

[1380] *Id.* at *6.

[1381] *Id.* at *5.

[1382] *Id.* at *6.

[1383] *Id.* (quoting Boghos v. Certain Underwriters at Lloyds, 115 P.3d 68, 71 (Cal. 2005)).

[1384] *Id.* (citing County of San Diego v. Ace Prop. & Cas. Ins. Co., 118 P.3d 607, 612–13 (Cal. 2005)).

[1385] *Id.* (citing Barrera v. State Farm Mut. Auto. Ins. Co., 456 P.2d 62, 688 (Cal. 1969)).

[1386] *Id.*

pilot's qualifications,[1387] the district court concluded that Plaintiff was "obligated under the terms of the binder to pay for claims arising from the crash."[1388]

The district court, however, denied the parties' cross-motions for summary judgment, finding that, although coverage existed under the binder for the subject incident, there remained questions of fact regarding the alleged negligence of both Plaintiff and Defendant in regard to the handling of the renewal application and policy.[1389] The district court thus left the issue of apportionment of liability for the resulting ambiguity for a jury to determine.[1390] Finally, the court granted Plaintiff's motion for summary judgment on Defendant's counterclaim for reformation because Defendant had failed to introduce any evidence to support its claim that Plaintiff's underwriter had "orally informed" Defendant's broker that the new policy would provide "as approved by" coverage.[1391]

B. PITT HELICOPTERS, INC. v. AIG AVIATION, INC.

Pitt Helicopters, Inc. v. AIG Aviation, Inc.[1392] involved an insurance dispute arising out of a helicopter crash in California.[1393] Plaintiff-Lessor, Pitt Helicopters, had leased a helicopter to Mountain EMS.[1394] Under the lease agreement, Mountain EMS was required to maintain $625,000 in hull coverage until the lease expired and the helicopter was returned.[1395] Plaintiff was an additional insured under the policy.[1396] The lease agreement provided that the amount of hull coverage could not be changed without Plaintiff-Lessor's prior written consent.[1397] After the helicopter was destroyed in a crash in California, Plaintiff alleged that its demand for payment from insurers under the policy revealed that Mountain EMS had reduced the required

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1387 *Id.* at *6 n.7 (citing Fireman's Fund Ins. Co. v. Superior Ct., 142 Cal. Rptr. 249, 251–56 (Ct. App. 1977)).

1388 *Id.* at *6.

1389 *Id.*

1390 *Id.*

1391 *Id.* at *8.

1392 No. 2:06-cv-2542-GEB-EFB, 2007 WL 707528 (E.D. Cal. Mar. 6, 2007).

1393 *Id.* at *1.

1394 *Id.*

1395 *Id.*

1396 *Id.*

1397 *Id.*

$625,000 hull value on the insurance policy to $500,000 with a deductible of $50,000.[1398]

The hull insurers, Defendants AIG Aviation and National Union Fire Insurance of Pittsburgh, initially filed a complaint in interpleader to determine "who was owed how much under [the] policy."[1399] Plaintiff Pitt Helicopters then filed a complaint against Defendants for "breach of contract and the implied covenant of good faith and fair dealing."[1400] Specifically, Plaintiff alleged that because Defendants failed to provide it notice that the policy limit had been reduced, the policy limit remained $625,000 as to Plaintiff at the time of the crash.[1401] Plaintiff further alleged that Defendants had breached the implied covenant of good faith and fair dealing because they withheld "benefits due under the policy unreasonably and without proper cause."[1402] Plaintiff sought compensatory damages for unpaid policy benefits totaling $175,000 and punitive damages.[1403]

Defendants filed a motion to dismiss Plaintiff's breach of contract, bad faith, and punitive damages claims.[1404] With respect to Plaintiff's breach of contract claim, Defendants argued that it had been insufficiently pled because no copy of the contract had been attached to the complaint which did not sufficiently allege the contract's terms.[1405] Therefore, according to Defendants, Plaintiff's breach of contract cause of action was defective.[1406] Plaintiff countered that the only material term at issue in the insurance policy was the policy limit, and that the complaint contained adequate allegations relating to the lease and the breach.[1407] Similarly, Defendants argued that the punitive damages claim had been improperly pled.[1408]

In considering Defendants' motion, the U.S. District Court for the Eastern District of California found that Plaintiff had adequately pled its breach of contract claim.[1409] It stated that

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1398 *Id.*
1399 *Id.*
1400 *Id.*
1401 *Id.*
1402 *Id.*
1403 *Id.*
1404 *Id.*
1405 *Id.* at *2.
1406 *Id.*
1407 *Id.*
1408 *Id.*
1409 *Id.*

Plaintiff did not need to recite contract terms in the complaint or attach a copy of the contract thereto, as Rule 8 of the Federal Rules of Civil Procedure, which governs pleadings, simply requires a "short and plain statement of the claim."[1410] However, the district court found that Plaintiff was not entitled to punitive damages because its bad faith claim had been commenced only in contract.[1411]

With respect to Plaintiff's claim that Defendants had breached the implied covenant of good faith and fair dealing, Defendants argued that bad faith liability could not be imposed "[w]here there is a genuine issue as to the insurer's liability under the policy," and that "some additional showing of tortious conduct by the insurer is required."[1412] While Plaintiff agreed that the mere refusal to honor a contract claim was insufficient to constitute bad faith, it asserted that "an unreasonable refusal to pay a just claim is bad faith" and that Defendants' filing the complaint in interpleader without first having investigated Plaintiff's claim was unreasonable.[1413]

In refusing to dismiss Plaintiff's bad faith claim at the initial stage of litigation, the district court noted that a failure to investigate a claim may constitute bad faith.[1414] In finding that Plaintiff had adequately pled its bad faith claim, the district court rejected Defendants' argument that the filing of an interpleader by an insurer "does not support a subsequent claim for 'bad faith'" as a matter of law.[1415] The district court stated that Defendants had failed to demonstrate how their interpleader action "negat[ed] Plaintiff's bad faith claim."[1416] Accordingly, the district court denied Defendants' motion to dismiss Plaintiff's claims for breach of contract and of the implied covenant of good faith and fair dealing, but granted its motion to dismiss Plaintiff's punitive damages claim.[1417]

[1410] *Id.* (citing Securimetrics, Inc. v. Hartford Cas. Ins. Co., No. C 0500917CW, 2005 WL 1712008, at *2 (N.D. Cal. July 21, 2005) (quoting FED. R. CIV. P. 8)).

[1411] *Id.*

[1412] *Id.*

[1413] *Id.*

[1414] *Id.* at *3 (citing Gruenberg v. Aetna Ins. Co., 510 P.2d 1032, 1038–39 (Cal. 1973)).

[1415] *Id.*

[1416] *Id.*

[1417] *Id.* at *2–*3.

IX. DEATH ON THE HIGH SEAS ACT

The Death on the High Seas Act ("DOHSA")[1418] is a federal statute that provides a statutory basis for the recovery of damages for wrongful death, including "loss of care, comfort and companionship" of the deceased where the death occurs as the result of, *inter alia*, a commercial aviation accident more than twelve nautical miles from the shores of the United States.[1419]

A. In re Air Crash Near Nantucket Island, Massachusetts, on October 31, 1999

In *In re Air Crash Near Nantucket Island, Massachusetts, on October 31, 1999*,[1420] the U.S. District Court for the Eastern District of New York addressed whether the parents, siblings, and cousin of a decedent passenger on EgyptAir Flight 990[1421] were entitled to pecuniary and nonpecuniary damages pursuant to DOHSA.[1422] Plaintiff's sister had commenced an action on behalf of the decedent's estate.[1423] Defendant did not contest liability.[1424]

The district court conducted a bench trial on the issue of damages.[1425] The decedent, age twenty-eight on the date of the crash, was survived by his parents, then fifty-nine and fifty-two years old.[1426] In addition, he was survived by four sisters (age twenty-six to thirty-four as of the date of the crash), a younger brother (age twenty-four), and a cousin (age nineteen), who had been raised since infancy by decedent's parents.[1427] The district court noted that, in Egyptian culture, the decedent, as the oldest of his parents' sons, was expected to care for his parents in their old age.[1428] After starting a business in Egypt in 1997, where he employed one of his sisters and his cousin, the

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[1418] 46 U.S.C. app. §§ 761–767 (2000).

[1419] *See In re* Air Crash Off Long Island, N.Y., on July 17, 1996, 209 F.3d 200, 202 (2d Cir. 2000); *In re* Air Crash Near Nantucket Island, Mass. on Oct. 31, 1999, 462 F. Supp. 2d 360, 364 (E.D.N.Y. 2006).

[1420] 462 F. Supp. 2d 360 (E.D.N.Y. 2006).

[1421] Flight 990, which was scheduled to travel from New York to Cairo, Egypt, crashed in the Atlantic Ocean approximately sixty miles off Nantucket Island on October 31, 1999, after departing from New York. *Id.* at 362.

[1422] *Id.* The court stated: "Since the crash occurred more than 12 nautical miles from the United States' shore, DOHSA applies." *Id.* at 362 n.1 (citing 46 U.S.C. § 761(b)).

[1423] *Id.* at 362.

[1424] *Id.* at 362 n.2.

[1425] *Id.* at 362.

[1426] *Id.*

[1427] *Id.*

[1428] *Id.*

decedent "began making varying cash contributions to his parents, siblings and cousin, and continued to do so until his death."[1429] At the time of his death, the sister and cousin employed by him were still living in the parents' home, two other sisters lived in separate homes with their husbands and children, and the fourth sister was separated from her husband and living with her children in the marital home in New Jersey.[1430] The decedent was flying back to Egypt on EgyptAir Flight 990 to close his business there.[1431]

The district court noted that in two prior decisions it had discussed the damages available under DOHSA.[1432] The court had previously noted as well that, prior to April 2000, damages under DOHSA were limited to pecuniary losses.[1433] In April 2000, the statute was amended, applying retroactively to deaths occurring after July 16, 1996, to permit recovery for nonpecuniary damages.[1434] As amended, the statute defines nonpecuniary damages as "loss of care, comfort, and companionship."[1435]

The district court stated that an action pursuant to DOHSA is "for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative."[1436] The district court noted that, as long as they met the required evidentiary standards, decedent's parents were entitled to damages for loss of support or society.[1437] However, the district court also noted that "a relative that is not a wife, husband, parent, or child of the decedent must separately establish both dependency and pecuniary loss in order to recover damages under DOHSA."[1438] The district court then stated that:

> [A]lthough [the decedent] was not legally required to do so, he regularly gave his siblings and cousin . . . money to pay for food,

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1429 *Id.* at 362–63.

1430 *Id.* at 363.

1431 *Id.*

1432 *Id.* at 364 (citing Freeman v. EgyptAir (*In re* Air Crash Near Nantucket Island, Mass., on Oct. 31, 1999), No. 00-MD-1344, 2002 WL 32302598 (E.D.N.Y. May 23, 2002); Kowalsky v. EgyptAir (*In re* Air Crash Near Nantucket Island, Mass., on Oct. 31, 1999), 307 F. Supp. 2d 465 (E.D.N.Y. 2004)).

1433 *Id.* (citing *In re Air Crash Near Nantucket Island, Mass., on Oct. 31, 1999*, 307 F. Supp. 2d at 468.)

1434 *Id.*

1435 *Id.*

1436 *Id.* at 365.

1437 *Id.* at 366.

1438 *Id.* at 365–66 (quoting Hollie v. Korean Air Lines Co., No. 83 Civ. 7899 (PNL) (NRB), 1994 WL 38785, at *4 (S.D.N.Y. Feb. 7, 1994), *vacated*, Korean Air Lines Co. v. Hollie, 516 U.S. 1088 (1996)).

> clothing, extraordinary medical treatment, private school tuition or, [with respect to his two sisters], to supplement their household incomes during periods of financial strain. For over two years, these contributions helped each maintain his or her standard of living.[1439]

In light of this, the district court found that the decedent's siblings and cousin qualified as dependent relatives under DOHSA.[1440]

The district court stated that, under DOHSA, pecuniary damages are meant to provide "fair and just compensation for the pecuniary loss sustained by the [beneficiaries] and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought."[1441] The district court noted that these damages include loss of support, *i.e.*, "all the financial contributions that the decedent would have made to his dependants [sic] had he lived."[1442] The amount of the pecuniary loss need not be proven to a "[m]athematical certainty," "but there must be some evidence from which the [court] can estimate future support without engaging in conjecture."[1443] The district court stated that, in determining the appropriate amount of pecuniary damages, among the "elements" to consider are the decedent's age and health, the earning capacity and prospects for advancement, surviving beneficiaries, the surviving beneficiaries' ages and the decedent's contributions to them.[1444] Based upon this, the district court awarded the decedent's parents, to whom he had contributed $2,000 per month, $535,389.[1445] The district court also awarded the decedent's sisters and cousin pecuniary damages ranging from nominal damages of $100 to $8,000 based upon their individual circumstances.[1446]

The district court then found that the decedent's parents, siblings, and cousin were entitled to nonpecuniary damages for

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[1439] *Id.* at 366.

[1440] *Id.*

[1441] *Id.* (quoting 46 U.S.C. app. § 762(a) (2000)).

[1442] *Id.* (quoting Freeman v. EgyptAir (*In re* Air Crash Near Nantucket Island, Mass., on Oct. 31, 1999), No. 00-MD-1344, 2002 WL 32302598 (E.D.N.Y. May 23, 2002)).

[1443] *Id.* (quoting *Hollie*, 60 F.3d at 93).

[1444] *Id.*

[1445] *Id.* at 367.

[1446] *Id.*

loss of society.[1447] The district court noted that the decedent's parents were very close to their son, which was heightened by the fact that he was their eldest son, and commented that "no parent ever wants to live to bury his or her child."[1448] The district court then found that the decedent's parents were entitled to a total of $1.31 million in nonpecuniary damages.[1449] Furthermore, although the district court was "not aware of, nor do the parties cite, any prior awards of nonpecuniary damages to a decedent's dependent relatives,"[1450] it awarded the siblings and cousin $125,000 each based upon the "similarly important role that [the decedent] played in each of their lives."[1451]

X. OTHER AVIATION RELATED CASES

A. GUNTHER V. AIRTRAN HOLDINGS, INC.

In *Gunther v. Airtran Holdings, Inc.*,[1452] the U.S. District Court for the Southern District of New York addressed a negligence action brought by Plaintiff to "recover damages for personal injuries she sustained as a result of a fall that occurred while she was in a motorized wheelchair traversing the jetway used for boarding [Defendant airline's flight] at New York's LaGuardia Airport."[1453]

Plaintiff had filed a complaint in New York State Supreme Court, but Defendant removed the action to the district court on the basis of diversity jurisdiction.[1454] Although the exact circumstances of the event were disputed, Plaintiff claimed that Defendant's employees breached recommended safety procedures and standards, and that there was an issue of fact whether Defendant exercised reasonable care under the circumstances, *i.e.*, aiding a disabled passenger in boarding the aircraft.[1455] She alleged, *inter alia*, that Defendant's refusal to allow her home-care attendant to assist her while boarding, failure to provide an aisle wheelchair, and inadequate assistance in escorting her to

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[1447] *Id.* at 367–68.

[1448] *Id.* at 368–69.

[1449] *Id.* at 369.

[1450] *Id.* at 370.

[1451] *Id.*

[1452] No. 05 Civ. 2134(MHD), 2007 WL 193592 (S.D.N.Y. Jan. 24, 2007).

[1453] *Id.* at *1.

[1454] *Id.*

[1455] *Id.* Plaintiff and Defendant disagreed on some of the facts at issue, including, *inter alia*, the number of escorts accompanying Plaintiff at the time of the incident; the slope of the jetway; and the speed at which Plaintiff was traveling before the fall. *Id.* at *2–*4.

the plane caused her to fall several feet "from the door of the aircraft and near the location of the metal molding in the jetway."[1456] The left side of her body struck the floor of the jetway due to the fall,[1457] allegedly resulting "in severe physical [injury] and emotional distress."[1458]

Defendant moved for summary judgment on the negligence claims, arguing that: (1) "premises liability is the only possible theory of recovery on these facts and that, based on this theory, the defendant did not owe a duty of care to the plaintiff because it [was] undisputed that [Defendant] did not own, and was not responsible for the maintenance of, the jetway at the time of the incident;" (2) Defendant's employees "followed all appropriate practices and procedures for boarding passengers with disabilities at the time of the incident;" and (3) the jetway was not defective or dangerous at the time of the incident, and thus Plaintiff's actions during the incident were the sole cause of her injuries.[1459]

The district court rejected Defendant's argument that premises liability was the sole source of Plaintiff's right to recover damages, and that Defendant owed no duty to the Plaintiff because it did not own, maintain, or control the jetway.[1460] The district court cited precedent from the Second Circuit explaining that, under New York law, the

> general rule [is] that [w]henever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to the circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.[1461]

The district court thus found that "[t]he question, then, is not one of ownership exclusively. . . . The question, rather, is whether the duty to use 'ordinary care and skill' arose independently, given other circumstances surrounding the incident."[1462] Under New York law, common carriers, such as airlines, are not

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[1456] *Id.* at *4, *9–*11.

[1457] *Id.* at *4.

[1458] *Id.* at *1.

[1459] *Id.* (citing Memorandum in Support of Defendant's Motion for Summary Judgment at 9).

[1460] *Id.* at *7.

[1461] *Id.* (citing Stagl v. Delta Airlines, Inc., 52 F.3d 463, 469 (2d Cir. 1995)).

[1462] *Id.*

held to a heightened standard of care, but rather must merely exercise "reasonable care under all of the circumstances of the particular case."[1463] The district court noted that it is "well settled that a common carrier 'is under a duty to provide prospective passengers with a reasonably safe, direct entrance onto the vehicle, clear of any dangerous obstruction or defect which would impede that entrance,'" regardless of ownership of the property involved.[1464]

The district court explained that whether it is appropriate to legally impose a duty upon a tortfeasor is a not a purely factual inquiry, but requires the court to consider a plaintiff's reasonable expectations under the circumstances.[1465] Finding that Defendant owed Plaintiff a "duty of reasonable care to ensure that the sole path available to [Plaintiff] would allow her the opportunity to secure safe passage onto the aircraft,"[1466] the district court stated that:

> Once a passenger has given her ticket to an airport gate agent and begun to go down the jetway to board an aircraft, the passenger certainly has a reasonable expectation that the gate agents have observed the obvious conditions of both passenger and pathway and, at a minimum, considered whether the path presents a hazard for that passenger.[1467]

The district court then turned to the issues of breach and causation and concluded that summary judgment was improper on these issues, noting that they are "generally and more suitably entrusted to fact finder adjudication."[1468] The district court noted that material issues of fact were disputed, such as "whether the employees' behavior conformed with defendant's own boarding guidelines, as well as with outside recommendations relating to the boarding of passengers with disabilities."[1469] The district court found that the "many factual disputes" prevented a matter of law determination that Defendant satisfied its duty to Plaintiff.[1470] It further found that, "[i]n sum, if the dis-

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[1463] *Id.* (quoting Bethel v. New York City Transit Auth., 703 N.E.2d 1214, 1218 (N.Y. 1998)).

[1464] *Id.* at *8 (citing Garcia v. Hope Ambulette Serv. Corp., 763 N.Y.S.2d 605, 605 (2003)).

[1465] *Id.*

[1466] *Id.* at *9.

[1467] *Id.* at *8.

[1468] *Id.* at *11 (quoting Palka v. Servicemaster Mgmt. Servs. Corp., 634 N.E.2d 189, 192 (N.Y. 1994)).

[1469] *Id.* at *10.

[1470] *Id.*

puted facts are viewed in the light most favorable to [Plaintiff], a fair inference can be made that defendant's actions and inactions were a proximate cause of plaintiff's injuries."[1471] Accordingly, the district court denied Defendant's motion for summary judgment.[1472]

B. In re Travel Agent Commission Antitrust Litigation

In *In re Travel Agent Commission Antitrust Litigation*,[1473] the U.S. District Court for the Northern District of Ohio addressed the recently-modified pleading standard necessary to establish "parallel conduct" in an antitrust suit.[1474] Plaintiffs were travel agents who opted out of a class in *Hall v. United Air Lines, Inc.*[1475] and now brought suit against Defendants[1476] for allegedly conspiring "to cap or cut travel agent commissions on six separate occasions" over a period of seven years.[1477] Defendant airlines moved to dismiss arguing, *inter alia*, that Plaintiffs could not meet the pleading standard required to demonstrate parallel conduct amongst the Defendants[1478] as established in 2007 by the Supreme Court in *Bell Atlantic Corp. v. Twombly*.[1479] In *Twombly*, the Supreme Court held that "an allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy . . . when allegations of parallel conduct are set out in order to make [an antitrust] claim, they must be placed in a context that raises a suggestion of a preceding agreement."[1480]

In analyzing Defendants' motion, the district court noted four separate arguments:

[1471] *Id.* at *11.

[1472] *Id.* at *12.

[1473] No. 1:03 CV 30000, 2007 WL 3171675 (N.D. Ohio Oct. 29, 2007).

[1474] *Id.* at *1–*2.

[1475] 296 F. Supp. 2d 652 (E.D.N.C. 2003).

[1476] Plaintiffs brought suit against thirteen airline defendants, including Alaska Airlines, Air Tran Airlines, American Airlines, America West Airlines, Continental Airlines, Delta Airlines, Horizon Air Industries, Frontier Airlines, KLM Royal Dutch Airlines, Northwest Airlines, United Airlines, and U.S. Airways/U.S. Airways Group. *Id.*; *In re* Travel Agent Comm'n Antitrust Litig., 2007 WL 3171675, at *1. Plaintiffs additionally brought suit against the holding company, Alaska Air Group, Inc. Plaintiffs dismissed U.S. Airways/U.S. Airways Group previously, without prejudice. *Id.* at n.2.

[1477] *Id.* at *3.

[1478] *Id.* at *2–*3.

[1479] 127 S. Ct. 1955 (2007).

[1480] *In re Travel Agent Comm'n Antitrust Litig.*, 2007 WL 3171675, at *2 (quoting *Twombly*, 127 S. Ct. at 1966).

> (1) Plaintiffs have failed to demonstrate parallel conduct with respect to [Defendant airlines] AWA, Alaska, AGA,[1481] Frontier, and Horizon; (2) Plaintiffs failed to allege any facts regarding KLM's participation in the alleged conspiracy; (3) Defendants Delta, United, and Northwest's assertion that Plaintiff's Amended Complaint should be dismissed because they have been discharged in bankruptcy; and (4) Plaintiffs have not plead sufficient facts that "plausibly suggest" an agreement or conspiracy.[1482]

With respect to the parallel conduct issue, the district court found that Plaintiffs claims against the four airlines failed because Plaintiffs had not "put forth any 'factual matter' suggesting that [the four airlines] engaged in parallel conduct" and Defendant airlines had either not implemented the alleged caps on travel agent commissions, or had implemented them at a later time than other airlines.[1483] With respect to Defendant KLM, the district court found that, because Plaintiffs did not specifically allege in their Amended Complaint that KLM "reduce[d], cap[ped] and eliminate[d]" travel agent commissions at any time, there was no parallel conduct between KLM and the other Defendants, and dismissal of Plaintiffs' claims against KLM were warranted.[1484] The district court also found that Plaintiffs were "permanently enjoined" from pursuing their claims against Defendants Delta, Northwest, and United by reason of these three airlines' previous discharge in bankruptcy proceedings.[1485] As to the remaining Defendants, the district court found that Plaintiffs' allegations of parallel conduct alone did not entitle them to relief, and neither did the additional allegation that there was an "opportunity to conspire."[1486] The

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[1481] While AWA, Alaska, Frontier, and Horizon are airlines, AGA is a holding company that did not actually pay commissions to travel agents, and as such, the court dismissed Plaintiffs' claims against AGA holding that "there is no factual matter to plausibly suggest that AGA joined or participated in an unlawful conspiracy." *Id.* at *3 n.4 (citing *Twombly*, 127 S. Ct. at 1956).

[1482] *Id.* at *2.

[1483] *Id.* at *4 (citing *Twombly*, 127 S. Ct. at 1956 ("stating a claim requires a complaint with enough factual matter (taken as true) to suggest agreement was made.")).

[1484] *Id.* The district court noted that "[t]he only appearance of KLM in the Amended Complaint, other than its identification as a Defendant, is the allegation that KLM was represented at three trade association meetings." *Id.*

[1485] *Id.* at *7 (citing 11 U.S.C. § 524(a)(2) (2000) ("discharge of a debt 'operates as an injunction against the commencement or continuation of an action to collect [or] recover . . . any such debt.")).

[1486] *Id.* at *9.

district court further noted that deposition testimony from an American Airlines executive indicated that, although each airline had hoped that other airlines would reduce the commissions being paid, "there was no agreement or conspiracy to do so."[1487] The district court finally noted that Plaintiffs' allegations that Defendants' commission rates were available to the other airlines, and that throughout history there have been price fixing cases and investigations against airlines, did not support Plaintiffs' instant allegations against Defendants.[1488]

The district court thereby granted Defendants' motion to dismiss concluding that Plaintiffs did not meet the pleading standard under *Twombly*, and as such had failed to state a claim upon which relief could be granted.[1489]

C. MORROW V. ISRAEL AIRCRAFT INDUSTRIES, LTD.

In *Morrow v. Israel Aircraft Industries, Ltd.*,[1490] the U.S. District Court for the Middle District of Florida addressed the potential liability of a medical services company for the deaths of passengers in the crash of an aircraft during a medical air evacuation that it helped to coordinate.[1491] *Morrow* arose out of the crash of an aircraft departing from Panama City, Panama.[1492] Plaintiffs, as executors of the estates of three individuals who perished in the crash, filed suit against, *inter alia*, Defendant Global Medical Management, Inc.[1493] Global Medical, at the request of one of its clients, had arranged for the air evacuation of a hospitalized patient, who was insured by its client, from Ecuador to Italy.[1494] Thereafter, Global Medical obtained several bids from air ambulance companies to perform the air evacuation.[1495] Its client then selected one air ambulance company to perform the evacu-

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[1487] *Id.* at *10–*11.

[1488] *Id.* at *11 (citing United States v. U.S. Gypsum Co., 438 U.S. 422, 443 n.16 (1978) ("the exchange of price data . . . can . . . increase economic efficiency and render markets more, rather than less, competitive."); Hall v. United Air Lines, Inc., 296 F. Supp. 2d 652, 662 (E.D.N.C. 2003) ("[T]here appears to be ' no case law . . . where history of collusion is used as a plus factor courts consider'")).

[1489] *Id.* at *12.

[1490] No. 2:05-cv-295-FtM-34DNF, 2007 WL 2826148 (M.D. Fla. Sept. 25, 2007).

[1491] *Id.* at *1.

[1492] *Id.*

[1493] *Id.*

[1494] *Id.* at *2.

[1495] *Id.* The district court noted that "Global Medical provides its clients with the names of various air ambulance companies and the client chooses one . . . and pays for the service." *Id.*

ation.[1496] Allegedly, unknown to Global Medical, the selected air ambulance company, thereafter, subcontracted the air evacuation to another company, and the aircraft crashed during the evacuation.[1497]

Plaintiffs thereafter filed suit alleging that Defendant was negligent in "(1) [f]ailing to properly arrange, plan, coordinate and oversee the flight; (2) [f]ailing to ensure that the proper aircraft and flight crew were utilized . . . ; and (3) [f]ailing to warn [the decedents] and others of the dangers posed by the inadequate aircraft and/or crew."[1498] Defendant Global Medical moved for summary judgment arguing, *inter alia*, that its role and duty owed to decedents was comparable "to that of a travel agent . . . because it was not involved in the 'planning, coordinating, or overs[ight] of the flight,'" and was not aware of any hazardous condition that would impose a duty to investigate or warn.[1499]

In responding to Defendant's motion, Plaintiffs argued, *inter alia*, that, because no discovery had yet occurred, they could not properly respond to Defendant's assertions.[1500] The district court agreed with Plaintiffs, denying Defendant's motion for summary judgment without prejudice on the ground that it was premature.[1501]

D. CERQUEIRA V. AMERICAN AIRLINES, INC.

The decision of the U.S. District Court for the District of Massachusetts in *Cerqueira v. American Airlines, Inc.*,[1502] addressed, *inter alia*, whether the trial court's purported failure to provide an explicit jury instruction regarding the "arbitrary and capricious" standard for proof of racial discrimination was prejudicial error.[1503] In *Cerqueira*, Plaintiff, a U.S. citizen of Portuguese descent, had commenced an action against Defendant for the violation of his civil rights[1504] stemming from his removal from

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1496 *Id.*

1497 *Id.*

1498 *Id.* at *1.

1499 *Id.* at *3.

1500 *Id.*

1501 *Id.* at *5–*6.

1502 484 F. Supp. 2d 232 (D. Mass. 2007).

1503 *Id.* at 233.

1504 Amended Complaint at 1, *Cerqueira*, 484 F. Supp. 2d 232 (No. 1:05-cv-11652), 2005 WL 5207271. Plaintiff alleged racial discrimination and asserted violations of law under: (1) 42 U.S.C. § 1981 (2000); (2) Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) (2000 & Supp. 2005); and (3) MASS. GEN. LAWS ANN. ch. 272, § 98 (West 1992 & Supp. 2008). *Id.*

Defendant's aircraft and its subsequent denial of service to him.[1505] The jury, which evaluated the allegations of racial discrimination, assessed $130,000 in compensatory damages and $270,000 in punitive damages.[1506]

Plaintiff was seated on Defendant's flight at Boston, Massachusetts' Logan Airport, awaiting takeoff for Fort Lauderdale, Florida, when two men of "physical appearance similar" to Plaintiff sat down beside him, and began speaking in English and a foreign language.[1507] After passengers and crew members became unsettled by the actions of the two men, Plaintiff, along with the two men, were asked to leave the plane, and were questioned, while the plane and luggage were rechecked.[1508]

Defendant filed post-judgment motions for judgment notwithstanding the verdict ("JNOV"), and for a new trial, arguing that the trial court did not instruct the jury that evidence of intentional discrimination must satisfy an "arbitrary and capricious" standard.[1509] Defendant also argued that "the introduction for a limited purpose of a consent order between the Department of Transportation ("DOT") and American," which had closed an enforcement proceeding against American relating to eleven claims of racial discrimination, "constituted unfair prejudice."[1510] Defendant's motions argued that the Federal Aviation Act provision on refusal of service requires a jury to consider evidence in light of the "arbitrary and capricious" standard.[1511] In its motion for a new trial, American also argued that the court's ruling "barring American from making any reference to Sensitive Source Information ("SSI") in non-public

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[1505] *Cerqueira*, 484 F. Supp. 2d at 233.

[1506] *Id.*

[1507] Amended Complaint, *supra* note 1504, at 7, 9, 12, 14.

[1508] Cerqueira v. Am. Airlines, Inc., 520 F.3d 1, 7–8 (1st Cir. 2008). Plaintiff's Amended Complaint stated, in pertinent part: "American Airlines caused Mr. Cerqueira to be removed from Flight 2237 and questioned by the Massachusetts State Police because it mistakenly believed that Mr. Cerqueira was of Arab, Middle Eastern or South Asian descent." Amended Complaint, *supra* note 1504, at 42.

[1509] *Cerqueira*, 484 F. Supp. 2d at 233.

[1510] *Id.*

[1511] *Id.* (citing 49 U.S.C. § 44902(b) (2000 & Supp. 2005)). The Federal Aviation Act provides, in relevant part, that "an air carrier, intrastate air carrier, or foreign air carrier may refuse to transport a passenger or property the carrier decides is, or might be, inimical to safety." *Id.* (quoting 49 U.S.C. § 44902(b)). The court further noted that "The provision makes no explicit mention of the standard that a plaintiff must satisfy . . . [and] no controlling law mandates the application of an arbitrary and capricious standard." *Id.* at 233–34.

regulations issued by the [DOT] prevented American from effectively presenting its defense."[1512]

In considering American's motion for a new trial, the district court found the "arbitrary and capricious" standard applicable in this set of circumstances.[1513] The district court explained that "this Court [previously has] recognized that 'actions motivated by racial or religious animus are necessarily arbitrary and capricious, and therefore beyond the scope of the discretion granted by . . . [the applicable Federal Aviation Act provision].'"[1514]

The district court found that, because the jury was instructed that Defendant's liability depended upon a finding of intentional discrimination, the jury verdict satisfied the "arbitrary and capricious" standard and, thus, the court denied the motion for JNOV, as well as Defendant's motion for a new trial on this issue.[1515] The district court stated that the failure to give an explicit jury instruction relating to the "arbitrary and capricious" standard was not prejudicial error.[1516]

In addition, the district court evaluated its discovery order barring American from introducing SSI into evidence.[1517] The district court found that American had "demonstrated good faith in its concern that it must comply with the disclosure requirements," and sympathized "with the bureaucratic morass that American apparently entered when it sought permission to disclose."[1518] However, the district court noted that the court "must also discharge its duty to effectuate the imperatives of efficiency and broad discovery," and that "this is not a case where the governing agency advised the Court that more time was required to balance security issues with proper discovery disclosures."[1519] Thus, the district court concluded that it had properly precluded Defendant from referring to non-public SSI regulations issued by the DOT at trial.[1520]

[1512] *Id.* at 234.

[1513] *Id.*

[1514] *Id.* (quoting Alshrafi v. Am. Airlines, Inc., 321 F. Supp. 2d 150, 162 (D. Mass. 2004)).

[1515] *Id.*

[1516] *Id.*

[1517] *Id.* at 234–35.

[1518] *Id.* at 235.

[1519] *Id.* (citing *In re* Sept. 11 Litig., 431 F. Supp. 2d 405, 408 (S.D.N.Y. 2006)).

[1520] *Id.* The reviewing court also found that the punitive damages award of $270,000 did not exceed the rational appraisal of evidence, and that there was no possibility of juror confusion on the alleged issue of punishing the airline for harm done to other non-parties by racial profiling. *Id.* at 239–40.

The district court additionally found that the consent order between the DOT and American concerning racial profiling by airline employees was properly admitted for the limited purpose in the action and was not unduly prejudicial.[1521] Specifically, the order was only admitted to demonstrate that "American had notice of alleged discriminatory practices prior to the case at hand."[1522]

In its concluding remarks, the district court stated that "our system gave, as it ought, the final judgment on a difficult issue of racial discrimination to the trusted institution of collective wisdom—the jury."[1523] Finding no error in the case, the district court held that the jury verdict should stand, and denied American's motion for a new trial.[1524]

The district court's verdict was reversed on appeal to the U.S. Court of Appeals for the First Circuit.[1525] The First Circuit found that, "[t]he jury must be instructed that the Captain has the power to refuse transport because transport of a passenger 'might be' inimical to safety unless that decision was arbitrary and capricious."[1526]

E. WILLIAMS V. UNITED AIRLINES, INC.

In *Williams v. United Airlines, Inc.*,[1527] the U.S. Court of Appeals for the Ninth Circuit addressed whether a federal district court had subject matter jurisdiction over a lawsuit by an employee alleging violations, by his employer, of the Federal Airline Deregulation Act's Whistleblower Protection Program[1528] ("WPP").[1529] Plaintiff, who was employed by Defendant United Airlines at its Oakland Maintenance Facility from 1989 until he was fired in 2003, filed a *pro se* complaint against Defendant alleging that it had wrongfully terminated him in retaliation for a

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[1521] *Id.* at 235–39.

[1522] *Id.* at 238.

[1523] *Id.* at 240.

[1524] *Id.*

[1525] Cerqueira v. Am. Airlines, Inc., 520 F.3d 1 (1st Cir. 2008).

[1526] *Id.* at 18.

[1527] 500 F.3d 1019 (9th Cir. 2007).

[1528] 49 U.S.C. § 42121 (2000).

[1529] *Williams*, 500 F.3d at 1020. The WPP "was designed to 'provide protection for airline employee whistleblowers by prohibiting the discharge or other discrimination against an employee who provides information to its employer or the Federal government about air safety or files or participates in a proceeding related to air safety.'" *Id.* at 1021 (quoting H.R. REP. NO. 106-167, pt. 1, at 100 (1999)).

dispute over an alleged safety violation, which he claimed was a violation of the WPP and state law.[1530]

Defendant moved to dismiss the state law claims and for summary judgment of the retaliatory discrimination claim.[1531] The district court, after finding that it had jurisdiction over the WPP claim pursuant to 28 U.S.C. § 1331, and supplemental jurisdiction over the state law claims, granted the motions and Plaintiff appealed.[1532] The Ninth Circuit affirmed the dismissal of Plaintiff's causes of action on the ground that the district court lacked subject matter jurisdiction, which the Ninth Circuit had raised *sua sponte*.[1533]

The Ninth Circuit stated that although 28 U.S.C. § 1331 provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States,"[1534] this statute "is applicable only when the plaintiff sues under a federal statute that creates a right of action in federal court."[1535] The Ninth Circuit noted that the WPP set forth a "detailed administrative scheme for the investigation and resolution of claims brought by airline employees."[1536] It, essentially, provided that if an aggrieved employee filed a complaint with the Secretary of Labor ("Secretary") that set forth a prima facie case, the Secretary must investigate the complaint and issue a final order, which is subject to review in the courts of appeal.[1537] Further, if, thereafter, the final order is not complied with, "either the Secretary or the employee may bring a civil action in a federal district court to compel compliance with the Secretary's order."[1538]

The district court had found that the WPP administrative filing requirement (*i.e.*, "[a] person who believes that he or she has been discharged or otherwise discriminated against . . . *may* . . . file . . . a complaint with the Secretary of Labor alleging such discharge or discrimination") was phrased permissively and, therefore, according to the district court, Plaintiff was not required to exhaust administrative remedies before commencing

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1530 *Id.* at 1020–21.

1531 *Id.* at 1021.

1532 *Id.*

1533 *Id.*

1534 *Id.*

1535 *Id.* at 1022 (citing Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 807–12 (1986); Utley v. Varian Assoc., Inc., 811 F.2d 1279, 1283 (9th Cir.1987)).

1536 *Id.* at 1021 (citing 49 U.S.C. § 42121(b) (2000)).

1537 *Id.* (citing 49 U.S.C. § 42121(b)).

1538 *Id.* (citing 49 U.S.C. §§ 42121(b)(5), (b)(6)).

an action pursuant to the WPP in federal district court.[1539] The Ninth Circuit disagreed with this construction, finding that it "conflate[d] the concepts of administrative exhaustion and subject matter jurisdiction."[1540] The Ninth Circuit stated the issue was not whether Plaintiff needed to have filed an administrative complaint before filing a claim in federal district court, but rather, was whether he was permitted to commence an action in federal district court at all.[1541] In finding that there was no express right of action under the WPP in federal district courts, the Ninth Circuit stated that "the 'may' language in § 42121(b)(1) merely confers authority on the Secretary of Labor to accept complaints from aggrieved employees."[1542]

In finding that there was no implied right of action under the WPP either, the Ninth Circuit stated that there was "no evidence that Congress intended to create a direct remedy in federal district court,"[1543] and noted that the "carefully-tailored administrative scheme in the WPP" undercut any suggestion that Congress intended to create an implied right of action.[1544] The Ninth Circuit additionally observed that the "explicit authorization of district court jurisdiction found in . . . other federal whistleblower statutes demonstrates that Congress clearly knows how to provide for such jurisdiction when it intends to do so."[1545]

The Ninth Circuit then noted that there was no diversity jurisdiction over the case, as Plaintiff and his direct supervisor were both residents of California.[1546] Therefore, the Ninth Circuit found that dismissal of Plaintiff's federal claim necessitated dismissal of his state law claims as well.[1547] Accordingly, the Ninth Circuit affirmed the dismissal of Plaintiff's action based on the district court's lack of subject matter jurisdiction.[1548]

F. Powers v. Lycoming Engines

The decision of the U.S. District Court for the Eastern District of Pennsylvania in *Powers v. Lycoming Engines*[1549] addressed

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1539 *Id.* at 1022 (quoting 49 U.S.C. § 42121(b)(1)).
1540 *Id.*
1541 *Id.*
1542 *Id.* at 1023.
1543 *Id.* at 1024.
1544 *Id.* (citing Love v. Delta Air Lines, 310 F.3d 1347, 1357 (11th Cir. 2002)).
1545 *Id.*
1546 *Id.* at 1025.
1547 *Id.* (citing Schultz v. Sundberg, 759 F. 2d 714, 718 (9th Cir. 1985)).
1548 *Id.* at 1020.
1549 245 F.R.D. 226 (E.D. Pa. 2007).

whether it was appropriate to certify a class of Plaintiff owners, and former owners, of aircraft containing allegedly defective engine crankshafts.[1550] Plaintiffs alleged that the engines, which were designed and manufactured by Defendant Lycoming Engines, could cause in-flight engine failures.[1551] Plaintiffs further alleged that Defendant knew of and concealed the defect that prevented the crankshaft from functioning properly.[1552]

Plaintiffs moved for class certification pursuant to Rule 23 of the Federal Rules of Civil Procedure.[1553] Under Rule 23(a), a party seeking to certify a class must demonstrate that: "(1) the size of the class is so numerous that joinder of all members is impracticable ["numerosity"]; (2) there are questions of law and fact common to the class ["commonality"]; (3) the claims or defenses are typical of the class ["typicality"]; and (4) the representatives will fairly and adequately protect the interests of the class ["adequacy of representation"]."[1554] Additionally, in order to maintain the class action, one of three bases under Rule 23(b) must be satisfied.[1555] Here, Plaintiffs alleged that all Rule 23(a) requirements were satisfied, and that a class action was superior to other available methods of adjudication thereby qualifying them for certification pursuant to Rule 23(b)(3).[1556] Defendant contended that class certification was inappropriate because, *inter alia*, "the facts as to both liability and damages [were] not common to all members."[1557]

In evaluating Plaintiffs' motion, the district court found that Plaintiffs' class was "ascertainable and sufficiently definite," and that the numerosity requirement was fulfilled since there were more than 3,000 potential plaintiffs according to FAA records.[1558] The district court further found that commonality existed because there were "common fact questions regarding what and when Lycoming knew of the alleged defect," and that

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1550 *Id.* at 227.

1551 *Id.*

1552 *Id.*

1553 *Id.* at 235 (citing FED. R. CIV. P. 23).

1554 *Id.* (citing FED. R. CIV. P. 23(a)(1)-(4)).

1555 *Id.* The court noted that "[P]laintiffs moved for certification only under subsection (b)(3), which requires a finding that common questions of law or fact predominate over questions affecting only individual class members, and that a 'class action is superior to other available methods for the fair and efficient adjudication of the controversy.'" *Id.* (quoting FED. R. CIV. P. 23(b)(3)).

1556 *Id.* at 239.

1557 *Id.* at 227.

1558 *Id.* at 228, 236.

typicality was established because "each member's claim arises from the same course of events and each class member will make the same legal arguments to prove liability."[1559] The district court determined that the adequacy of representation prong was satisfied because Defendant had not presented any reason why Plaintiffs' proposed representatives were inadequate, and because the proposed representatives' interests were "not dissimilar to those of the proposed class."[1560] Finally, the district court agreed with Plaintiffs that "a class action is superior to other methods for the fair and efficient adjudication of the controversy" in this case, thereby fulfilling the final requirement under Rule 23(b)(3) and granted Plaintiffs' motion for class certification.[1561]

G. GONZALEZ V. CARIBBEAN SUN AIRLINES, INC.

The decision of the U.S. District Court for the District of Puerto Rico in *Gonzalez v. Caribbean Sun Airlines, Inc.*[1562] addressed whether the "locus of operations" test or the "nerve center" test applied to determine Defendant airline's principal place of business for purposes of establishing whether the district court had diversity jurisdiction.[1563] Plaintiff had filed a complaint in Puerto Rico against the Defendant for wrongful discharge under local law.[1564] Defendant removed the action based on diversity of citizenship, alleging that it was a Delaware corporation with its principal place of business in Florida, and that Plaintiff was a "resident" of Puerto Rico whose claim exceeded the jurisdictional threshold set forth by 28 U.S.C. § 1332(a).[1565]

Plaintiff moved to remand the case under the "locus of operations" test, which focuses on the location of the actual physical operations of a corporation.[1566] Plaintiff stated that Defendant's principal place of business, and physical operations, were in Pu-

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[1559] *Id.* at 228.

[1560] *Id.* at 237.

[1561] *Id.* at 237–39.

[1562] No. 06-1934 (JAG), 2007 WL 2464508 (D.P.R. Aug. 8, 2007).

[1563] *Id.* at *1–*2. "Diversity of Jurisdiction exists only when there is complete diversity, that is, when no plaintiff is the citizen of the same state as any defendant." *Id.* at *3 (quoting Strawbridge v. Curtiss, 7 U.S. 267 (1806)). Further, "a corporation is a citizen of both the state where it is incorporated and 'the State where it has its principal place of business.'" *Id.* (quoting 28 U.S.C. § 1332(c)(1) (2000)).

[1564] *Id.* at *1.

[1565] *Id.*

[1566] *Id.* at *1, *3.

erto Rico, as, *inter alia*, its aircraft and the majority of its pilots, flight attendants, and mechanics were based in Puerto Rico, it originated or ended flights to ten Caribbean destinations from its Puerto Rico hub, and it transported the majority of its code share passengers from Puerto Rico.[1567] Plaintiff further stated that Defendant had only "some executives," but no physical operations of its core business, in Florida.[1568]

Although Defendant did not dispute Plaintiff's assertions, it contended that because it was a "complex airline" with operations in several jurisdictions, the "locus of operations" test did not apply and that instead, the "nerve center" test should apply.[1569] Specifically, Defendant contended that the "nerve center" test, which looked to "the location from which the corporation's officers direct, control and coordinate all activities without regard to locale, in furtherance of the corporate objective," must be applied to establish the location of its principal place of business.[1570] Defendant argued that "courts have consistently applied the 'nerve center' test in determining the principal place of business of airlines."[1571] Defendant further argued that, under the "nerve center" test, its principal place of business was in Florida because its "major corporate and financial decisions t[ook] place there," and therefore that removal was proper because there was "complete diversity between the parties."[1572]

The district court noted that "the removing party bears the burden of showing that removal is proper."[1573] The district court found that the "nerve center" test did not apply, as it applies "only where a corporation has no physical operations . . . (e.g.[,] a holding company),[1574] or where its [operations] and activities are so diffuse or pervasive that no place readily comes up as distinctively dominant."[1575] The district court thus con-

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1567 *Id.* at *1–*2.

1568 *Id.* at *1.

1569 *Id.* at *2.

1570 *Id.* (quoting Lugo-Vina v. Pueblo Int'l, Inc., 574 F.2d 41, 43 (1st Cir. 1978)).

1571 *Id.* at *2, *4 (citing Egan v. Am. Airlines, Inc., 324 F.2d 565 (2d Cir. 1963), Briggs v. Am. Flyers Airline Corp., 262 F. Supp. 16 (N.D. Okla. 1966)).

1572 *Id.* at *2–*3.

1573 *Id.* at *3 (citing Danca v. Private Health Care Sys., Inc., 185 F.3d 1, 4 (1st Cir. 1999)).

1574 *Id.* at *4 (citing Taber Partners, I v. Merit Builders, Inc., 987 F.2d 57 (1st Cir. 1993)).

1575 *Id.* (citing *Lugo-Vina*, 574 F.2d at 41 ("[t]he 'nerve center' test was developed for application in cases involving a 'large corporate enterprise with com-

cluded that the "locus of operations" test should be applied and, under that test, Puerto Rico was Defendant's principal place of business because the majority of its physical operations were located there.[1576] Accordingly, the district court held that, because the action lacked diversity, there was no basis for federal jurisdiction and granted Plaintiff's motion to remand.[1577]

XI. PASSENGER BILL OF RIGHTS

As passenger traffic has returned to pre-9/11 levels, there have been an increasing number of delayed flights resulting, at times, with passengers being forced to remain onboard an aircraft at an airport for hours.[1578] In the past year, these delays have generated increased news media and public attention,[1579] and federal and state governments have taken steps to address the services provided by airlines to passengers and aircraft conditions during these delays.

A. FEDERAL GOVERNMENT ACTION

1. Airline Passenger Bill of Rights Act of 2007 Bills

The federal government is considering two Airline Passenger Bill of Rights Act of 2007 bills,[1580] introduced by the Senate and House of Representatives, respectively, to address these issues. Both Bills were introduced to amend Title 49, United States Code, to ensure that air passengers have access to necessary services, and are not forced to stay on a grounded aircraft for an unreasonable period of time before or after a flight.[1581] In situations where the plane is delayed, air carriers must provide food,

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plex and farflung activities where only the 'nerve center' can actually be termed the 'principal place of business'")). *Id.* at *4 n.4.

[1576] *Id.* at *4.

[1577] *Id.* at *5.

[1578] *See, e.g., Airline Service Improvements: Hearing on S. 678 Before the S. Comm. on Commerce, Science, & Transportation*, 110th Cong. (2007) (statement by Kate Hanni, Spokesperson and Founder, Coalition for Airline Passengers' Bill of Rights).

[1579] *See e.g.*, Matthew Wald & Jeff Bailey, *Push for Action on Flight Delays*, N.Y. TIMES, Sept. 28, 2007, at A; *see also* Matthew Wald, *Washington Taking a Look at Air-Traffic Problems*, N.Y. TIMES, Sept. 27, 2007, at C.

[1580] The Bill was introduced in the Senate by Sens. Barbara Boxer and Olympia Snowe on February 17, 2007, as S. 678 ("Senate Bill") and in the House of Representatives by Representative Mike Thomson (on behalf of fellow co-sponsors) on March 1, 2007, as H.R. 1303 ("House Bill"). S. 678, 110th Cong. (2007); H.R. 1303, 110th Cong. (2007).

[1581] S. 678, 110th Cong. (2007); H.R. 1303, 110th Cong. (2007).

water, and adequate restroom facilities.[1582] Moreover, if a flight is delayed more than three hours after the passengers have boarded, the air carrier must give passengers the option to disembark the aircraft at least once every three-hour period.[1583] There are exceptions, however, if the pilot determines that, after three hours of delay, the aircraft will depart within thirty minutes or if permitting a passenger to deplane would compromise safety or security.[1584]

The House Bill is more comprehensive than the Senate Bill.[1585] The House Bill would require an airline to establish specific procedures for handling passengers' complaints;[1586] allow passengers to deplane an aircraft in case of a departure or arrival delay requiring passengers to remain seated in a grounded aircraft for more than three hours;[1587] provide passengers at the airport, or onboard an aircraft, with the best information available to the air carrier regarding flight delay, cancellation, or diversion;[1588] provide passengers on a departure or arrival-delayed grounded aircraft with ventilation, food, water, sanitary, and medical services;[1589] publish a monthly list of its chronically delayed flights, and provide such information when selling tickets;[1590] publish and update lowest fare and schedule information;[1591] and make every reasonable effort to return lost baggage to passengers within twenty-four hours.[1592]

The House Bill also directs the Secretary of Transportation to work with air carriers to ensure that a pilot operating an aircraft affected by a long departure delay is permitted to return the aircraft to the terminal to allow passengers to deplane without losing its position in the flight's departure sequence,[1593] and re-

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1582 S. 678, 110th Cong. § 41781 (a)(1)(A)–(B) (2007).

1583 S. 678, 110th Cong. § 41781(a)(2)(A) (2007).

1584 S. 678, 110th Cong. § 41781 (a)(2)(B)(i)–(ii) (2007).

1585 *See* Stephen Beale, *Passenger Bill of Rights Time Line*, UNION LEADER, Nov. 13, 2007. On September 24, 2007, the House passed a re-authorization bill for the FAA which includes portions of the Airline Passenger Bill of Rights. *Id.* On November 6, 2007, the House passed a continuing resolution for temporary funding of the FAA, which otherwise would have expired on Nov. 16. *Id.* Congress thereby had until December 31, 2007, to approve full funding for the FAA. *Id.*

1586 H.R. 1303, 110th Cong. § 41782 (a) (2007).

1587 H.R. 1303, 110th Cong. § 41782 (c)(1) (2007).

1588 H.R. 1303, 110th Cong. § 41782 (b)(1) (2007).

1589 H.R. 1303, 110th Cong. § 41782 (c)(3) (2007).

1590 H.R. 1303, 110th Cong. § 41782 (d)(1)–(2) (2007).

1591 H.R. 1303, 110th Cong. § 41782 (e)(1) (2007).

1592 H.R. 1303, 110th Cong. § 41782 (f) (2007).

1593 H.R. 1303, 110th Cong. § 41783 (a) (2007).

view air carriers' and airports' emergency-contingency plans to ensure that the plans are effectively coordinated to address weather emergencies.[1594]

B. State Action

1. *New York Passenger Bill of Rights*

Government action relating to a passenger bill of rights has not been limited to the federal government, as the New York State legislature enacted the New York Passenger Bill of Rights. Governor Eliot Spitzer approved the legislation in August of 2007, and it was scheduled to take effect on January 1, 2008.[1595] As a result of the legislation, New York became the first state to enact legislation that would require airlines operating at its airports to provide food, water, and services to passengers delayed on aircraft for more than three hours.[1596] However, the legislation was challenged before it took effect and, although the U.S. District Court for the Northern District of New York found that it was not preempted by the ADA,[1597] the U.S. Court of Appeals for the Second Circuit reversed this ruling.[1598] Specifically, the Second Circuit held "that requiring airlines to provide food, water, electricity, and restrooms to passengers during lengthy ground delays does relate to the service of an air carrier and therefore falls within the express terms of the ADA's preemption provision."[1599] Accordingly, it found that the New York Passenger Bill of Rights was preempted by the ADA.[1600]

[1594] H.R. 1303, 110th Cong. § 41783 (b)(1) (2007).

[1595] *See* New York Passes Passenger Bill of Rights, Upgrade: Travel Better, http://www.upgradetravelbetter.com/category/passengers-bill-of-rights/ (last visited June 21, 2008).

[1596] *See* Aaron Karp, *New York Passes "Passenger Bill of Rights," First of its Kind in U.S.*, ATW Daily News, Aug. 7, 2007, http://www.atwonline.com/news/story.html?storyID=9795.

[1597] Air Transport Assoc. of Am., Inc. v. Cuomo, 528 F. Supp. 2d 62, 68 (N.D.N.Y. 2007).

[1598] Air Transport Assoc. of Am., Inc. v. Cuomo, 520 F.3d 218, 225 (2d Cir. 2008).

[1599] *Id.* at 223. The Second Circuit declined to address whether the Passenger Bill of Rights was preempted by the Federal Aviation Act of 1958. *Id.* at 225.

[1600] *Id.* at 223.

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Carl Zollmann
(1879-1945)